No. 10713

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AARON FERER & SONS, a co-partnership,

Appellant,

vs.

RICHFIELD OIL CORPORATION, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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No. 10743

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AARON FERER & SONS, a co-partnership,

Appellant,

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Appellee.

APPELLANTS' OPENING BRIEF.

A.

Jurisdiction is sustained in this case by Title 28, Section 225, and Title 28, Section 400. (Jud. Code, Sec. 274d) U. S. Codes.

B.

Questions Raised by This Appeal.

1. Where a complaint for Declaratory Relief shows that an actual controversy exists between the parties concerning their rights and duties under a written contract; that the property involved consists of casings in oil wells valued at $50,000.00; that the parties desire to act on their rights; that present rights are involved and defendant is withholding plaintiff's property, and that the parties are not friendly, is it error for the trial court to dismiss the complaint on the ground that the contract is clear and un-

ambiguous and that by its terms said property has been sold to the plaintiiff;

2. Is it error for the trial court, after construing said contract as above stated, and where it is shown that defendant's answer and counter pleading is sham and frivolous, to deny plaintiff's motion for summary judgment?

3. Where, in said action, defendant by counter-pleadings seeks reformation of the written contract on the ground of mutual mistake or mistake of one party which is known or suspected by the other and the evidence fails to show any prior agreement different from the written contract, should the judgment for the defendant be reversed if the court does not find that any prior and different agreement was entered into?

4. In the case stated in No. 3, if the ground was mistake by the defendant, which plaintiff knew or suspected, is it essential that defendant plead and prove and that the court find that the mistake did not result from defendant's negligence?

5. Where findings that the one party to a written contract did not intend to purchase property conveyed thereby and that the other party did not intend to sell the same, based entirely upon other findings of facts which do not logically or rationally tend to show such lack of intent on the part of said parties, and where no prior oral agreement is found, can said findings sustain a conclusion of law or a judgment that the written contract should be reformed to conform to an intent of the parties which the court finds the parties had when the written contract was executed?

C.

Statutes involved. Title 28, Section 400, U. S. C. (Jud. Code, Sec. 274d), entitled "Declaratory Judgment Authorized; Procedure," Sections (1) and (2):

(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

Rule 56, Rules of Civil Procedure, entitled "Summary Judgment," subdivision (a), for Claimant.

> "A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

Subdivision (c):

> "Motion and Proceedings thereon. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the

day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Subdivision (e):

"Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

Section 3399 of the Civil Code of California, entitled, When Contract May Be Revised, provides:

"When, through fraud or mutual mistake of the parties, or mistake of one party, which the other at the time knew or suspected, a written contract does not fully express the intention of the parties, it may be revised, upon the allegation of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value. (Enacted 1872.)"

Section 1856 of the Civil Code of Procedure, entitled An Agreement Reduced to Writing Deemed the Whole, provides:

When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings;

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term agreement includes deeds and wills, as well as contracts between parties.

Section 1865 of the Code of Civil Procedure, entitled "A Written Instrument Construed As Understood By Parties", provides:

A written notice, as well as every other writing, is to be construed according to the ordinary acceptation of its terms.

Section 1656 of the Civil Code of California, entitled Necessary Incidents Implied, provides: All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

Explanatory Statement of Facts.

This appeal is taken from a judgment in favor of the defendant based on its "counterclaim and cross-complaint."

The action was begun by Ferer & Sons, a co-partnership, whose business was dealing in junk and second-hand machinery and equipment.

The amended complaint consisted of two counts. By the first count the plaintiff sought declaratory relief pertaining to a controversy with respect to the duties and rights of Ferer & Sons and Richfield Oil Corporation under a written contract to which they were the parties as buyer and seller respectively.

The subject matter of the contract was the "production equipment and facilities" of an oil field in Santa Barbara County which property was owned by Richfield. The dispute arose over the casings in the oil wells, the question at issue being whether by the terms of said contract, the casings were included or excluded from the property sold and conveyed.

In the District Court the suit was owned by the defendants through the skillful legal maneuvering of its able counsel who came from behind after having decisively lost the opening round of the battle.

From a professional standpoint the story of this accomplishment is interesting and educational. As a practical business matter it is drab, unattractive and costly to the appellant.

In the second count of the amended complaint damages were alleged for breach of the contract and the prayer asked judgment thereon in case the court should deny the prayer for declaratory relief and specific performance

under count one. At the outset the defendant boldly moved that both counts be dismissed on the ground that the contract expressly excluded the oil well casings from the sale, thus compelling an immediate interpretation of the contract.

In due time the trial judge, Honorable Harry A. Hollzer, denied the motion to dismiss the amended complaint but "sustained" the motion to dismiss the first count and directed the defendant to answer the second count. [R. p. 41.]

This order was accompanied by a "memorandum of conclusions" in which the court carefully and ably analyzed the terms of the contract and concluded that "under the terms of said contract the defendant sold and conveyed to plaintiiff the casing in the oil wells on defendant's land described in said contract," and, also, that "the court further concludes that upon the face of the pleadings it appears that defendant has wrongfully breached said contract," this conclusion, however, being reached without prejudice to the right of the defendant to answer the amended complaint and establish such defense as it may have thereto." [R. p. 38.]

It is obvious that the reservation of court's decision for further developments depending on the defendant's answer applied only to conclusion that defendant had breached the contract as alleged in count two of the amended complaint and did not apply to the interpretation of the contract which was sought by count one, which conclusion or finding was not thereafter revised or altered.

Since the court had construed the contract favorably to the defendant and the defendant's only claim in refusing to permit plaintiff to remove the casing, up to that

time,[1] had been that the contract itself excluded the casing from the sale. The way was apparently clear for a motion by the plaintiff for summary judgment.

However, the answer was duly filed. It consisted of a maverick document the latter portion of which included among other things, a "counterclaim or cross-complaint" in which an oral agreement was alleged to have been entered into antedating the written contract by which the casings were excluded from the sale. The defendant prayed that the written contract be reformed to conform to said alleged oral agreement.

It was this juncture, that plaintiff moved for summary judgment against the defendant. The motion was based primarily on the grounds that defendants pleading and defense was "written merit and frivolous." This motion was supported by the affidavit of Morris Ferer in which it was averred, that he, alone, had conducted the negotiations for plaintiff relative to said sale, culminating in said written contract, and that no oral agreement had ever been entered into prior thereto, different from said written instrument or excluding said casings from said sale. The defendant filed opposition affidavits[2] none of which contained any denial of the Ferer averment concerning the absence of any prior oral agreement as set forth in the counterclaim, and none of said opposition affidavits repeated said averments of defendant's pleading.

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[1]See affidavit of Morris Ferer in support of plaintiff's motion for sumsary judgment which was never denied. [R. p. 59.] Plaintiff awaited defendant's answer and then promptly moved for summary judgment. [R. p. 56.]

[2]Affidavits of its employees, Davis [R. p.....]; McGahan [R. pp. 83, 97], and Kelly [R. p. 196].

The court permitted the defendant to take the depositions of Morris Ferer, Zeidenfeld and Clements.[3] Zeidenfeld's deposition showed that he knew nothing about the negotiations involved and Clements swore that he had no part in them and Ferer absolutely denied the alleged oral agreement. Nevertheless, after long deliberation Judge Hollzer denied plaintiff's motion for summary judgment [R. p. 112.]

Thereafter a trial was had in which the court opened wide the door and permitted the defendant to assail the integrity of the written contract without let or hindrance, regardless of the fact that no prior oral agreement was ever attempted to be proved. The court's findings contain no reference to such prior agreement, and it expressly refused to make any finding which would conflict with the decision in denying the motion to dismiss.

The procedure thus followed in the trial was regarded as proper by the trial judge principally by reason of an averment in defendant's counter pleading to the effect that the defendant executed the written contract through its own mistake and that the plaintiff knew or suspected said mistake on the part of the defendant. Appellant expects to show that the circumstances which convinced the trial judge that Morris Ferer suspected that the Richfield Corporation did not intend to sell the oil well casings when it executed the contract which so provided could not justify even a rational suspicion that Ferer so suspected. We expect to also prove that if the testimony of Richfield's employees is true that they knew that

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[3]Zeidenfeld was an employee of plaintiff. Clements was a dealer in second-hand equipment and owned a one-third interest in the written contract. [R. p. 154.]

their employer intended to retain the casings, their conduct in admittedly failing to so inform Ferer upon occasions when silence amounted to concealment, and in executing written instruments which expressly represented that the casings were being sold, constitutes criminal fraud.

When these things and other assignments of error are sustained are shown appellant anticipates that this court will conclude that such of Judge Hollzer's findings as number 29, which declares that defendant's vital mistake "was not caused by or the result of negligence on the part of the defendant," are contrary to the evidence.

Appellant assigns the following grounds for reversal of the judgment rendered herein:

I.

The Trial Court erred in denying plaintiff's motion for summary judgment.

II.

The Court erred in dismissing the First Cause of Action in plaintiff's complaint.

III.

All of the essential findings of fact are contrary to the evidence. They are unsupported by any substantial evidence.

IV.

The findings are insufficient to support the conclusion of law or the judgment.

V.

The conclusions of law do not sustain the judgment.

APPLICABLE FUNDAMENTAL PRINCIPLES OF LAW.

Pertaining to the rules governing the reformation of contracts upon the ground of mistake, the legal premises will be laid in the beginning so that with them recalled to mind the factual situations and evidentiary items to be presented may be more readily evaluated and classified with the use of minimum of space and words.

I.

The First Essential to the Right to Reform a Written Contract Is Proof of a Prior Oral Contract.

In a Federal case, *Fidelity and Guaranty Fire Corp. v. Bilquist,* 108 Fed. (2d) 715, the court said:

> *"The prime factor in all cases justifying reformation of a written contract is an oral or implied agreement* which the written contract was intended to express."

From another Federal decision, *Columbian Nat'l L. Ins. Co. v. Black,* 35 F. C. D. 571 (71 A. D. A. 128), we quote:

> "(5) 2 Lack of antecedent agreement. It is quite true that before a writing may be reformed, to express the real agreement of the parties, the parties must have agreed. Rescission may sometimes be had because there is no agreement, but reformation necessarily implies an agreement. *Travelers Ins. Co. v. Henderson,* 69 F. (2d) 762 (8 C. C. A.); *Southern Surety Co. v. U. S. Cast Iron Pipe & F. Co.,* 13 F. (2d) 833 (8 C. C. A.)."

The case last cited in the above quotation, *Southern Surety Co. v. United States, etc. Co.,* 13 F. (2d) 833, not only upholds the text of the *Columbian, etc. v. Black* case but upon facts very similar to those of the instant

case, holds that no prior agreement was proved, although the trial court had held to the contrary.

The Supreme Court of California, in the case of *Harding v. Robinson,* 175 Cal. 534, at page 542, said:

> "He must show, in addition to the mutuality of mistake, *that the minds of the contracting parties met, that they agreed upon a certain thing* which was to have been embodied in their contract, and that by mistake it was either fraudulently or inadvertently omitted or clumsily and ambiguously expressed." (Italics ours.)

To the same effect, also, see: *22 Cal. Jur.,* p. 734; 43 *R. C. L.,* p. 310; 53 *Cal. Jur.,* p. 934; *Pomeroy's Eq. Jur.,* Secs. 859, 1376(L). This proposition is so universally established and so fundamental that extended quotations from decisions are unnecessary.

It is not enough to prove the prior agreement and changes, in the executed contract.

It is essential to *plead* and *prove how the alleged mistake was made.*

> *National Bk. v. Ex. Nat'l Bk.,* 186 Cal. 172;
> *Auerbach v. Healy,* 174 Cal. 60.

The *Auerbach* case involved an alleged mistake in the description of property. The complaint alleged that "the draftsman omitted to insert in said description the block in which said lot of land is located." The court said,

> "Nevertheless, both parties may have fully understood it and may have intended it to be as it is,"

and, it was declared:

> "It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, so that mutuality may appear," (Citing 34 *Cyc.* 973, and 14 *Ency. Pl. & Pr.* 42.)

II.
The Degree of Proof Required.

The evidence must be of "the clearest and most satisfactory character."

American Chemical v. Tremaine Land Co., 17 F. (2d) 549;

Sun v. Vinton Pet. Co., 248 Fed. 623.

California decisions to the same effect, are:

Burt v. Los Angeles Olive Growers' Ass'n, 175 Cal. 669;

Hockstein v. Berghauser, 123 Cal. 861.

To the same effect are:

Holsen v. Butler, 63 Cal. App. at p. 72;

Burt v. L. A. Olive Growerss Ass'n, 175 Cal. 60;

Ford v. Yarba, 123 Cal. 447, 449.

It is apparent that both Federal and State courts are in full accord with the law elsewhere, and that as said in the *Southern Surety Company* decision opinion the prior agreement must be proved by the "clearest and most satisfactory character."

"The evidence must be such as to leave no reasonable doubt upon the mind of the court," that the mistake was mutual and contrary to a prior completed agreement.

Menefee L. Co. v. Gamble, 242 Pac. 628, 631.

III.

Presumptions and Burden of Proof.

1. It is presumed that the written instrument expresses the true intention of the parties.

Moore v. Vandermast, 19 Cal. (2d) 94, 119 Pac. (2d) 129;

Security First Nat. etc. Bk. v. Loftus, 129 Cal. App. 650, 19 Pac. (2d) 295;

Welk v. Conner, 102 Cal. App. 286, 282 Pac. 953.

2. Every presumption to be invoked is in favor of the correctness of the written instrument and against the alleged prior agreement.

Burt v. Los Angeles Olive Growers' Assn., 175 Cal. 668, 166 Pac. 993;

Menning v. Sourissean, 128 Cal. App. 635, 18 Pac. (2d) 77;

Hockstein v. Berghauser, 123 Cal. 681, 56 Pac. 547.

3. The burden of proof is on the party who seeks reformations to show that the instrument does not express the intent of the parties.

Moore v. Vandermast, Inc., 19 Cal. (2d) 94;

California Tr. Co. v. Cohn, 9 Cal. App. (2d) 33, 40;

Burt v. L. A. Olive Growers' Ass'n, 175 Cal. App. 668, 675;

Hockstein v. Berghauser, 123 Cal. App. 681 684;

Fraters Glass, etc. Co. v. S. W. Cons. Co., 107 Cal. App. 1;

Bell v. McColgan, 45 Cal. App.

In *Menning v. Sourissean, supra,* it is said:

> "Every presumption in equity favors the view that a written instrument deliberately executed expresses the true intention of the parties and the burden of showing that an instrument does not express the true intent or meaning of the parties is upon him who seeks to avoid its plain terms and who seeks the reformation of a contract on the ground of mutual mistake must show the mistake by clear and convincing proof."

The other decisions cited above, without an exception, are in full accord with this doctrine and these rules.

4. Having announced the above rlues, especially "1" and "3" above, our Supreme Court in *Moore v. Vandermast,* added:

> "This is particularly true where, as here, the instrument was drafted by an attorney representing the party seeking to alter the terms of the written instrument."

The situation is the same in the instant case, except that in *Moore v. Vandermast, Inc.,* both parties were "aided by counsel", whereas in this case Mr. Paradise drafted the contract and Aaron Ferer & Sons, accepted it, unaided by counsel.

Section 1855 of the Civil Code of Procedure, entitled, "Contents of Writing, How Proves," provides:

> "There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:
>
> 1. When the original has been lost or destroyed, in which case proof of the loss or destruction must be first made.
>
> 2. When the original is in the possession of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.
>
> 3. When the original is a record or other document in the custody of a public officer.
>
> 4. When the original has been recorded, and a certified copy of the record is made evidence by this code or other statute.
>
> 5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole."

Section 1656 of the Civil Code of California, entitled "Necessary Incidents Implied," provides: All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.

ARGUMENT.

I.

The Trial Court Erred in Denying Plaintiff's Motion for Summary Judgment.

Plaintiff's motion is authorized by to Federal Rules of Civil Procedure, Rule 56. The first paragraph of the rule authorizes the motion on the part of the plaintiff. It reads:

> "(a) For claimant, a party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment, may at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or part thereof."

Plaintiff's motion for a summary judgment reads:

> "Plaintiff Aaron Ferer & Sons moves the Court as follows:
>
> I.
>
> For a Summary Judgment in favor of plaintiff and against defendant as to all matters contained in plaintiff's complaint and defendant's counter-claim or cross-complaint, except the amount of damages to which plaintiff is entitled, for the following reasons:
>
> The court has heretofore concluded:
>
> (1) That under the terms of the written contract between the parties hereto, defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract, and
>
> (2) That upon the fact of the pleadings it appears that defendant has wrongfully breached said contract. (This conclusion, however, being reached without prejudice to the right of defendant to answer the

amended complaint and establish such defense as it may have thereto.)

The defendant has no defense to its said breach and that the allegations contained in defendant's answer on file herein to the effect that plaintiff is in default under said written contract, are without merit and are in fact frivolous.

The allegations contained in defendant's counterclaim or cross-complaint purporting to establish a cause of action for reformation of said written contract are not founded upon truth and cannot be supported by evidence."

Plaintiff's motion was supported by the affidavit of Morris Ferer. This affidavit reads as follows:

"State of California, County of Los Angeles—ss.

Morris Ferer, being first duly sworn, upon oath, deposes and says:

1. That he is one of the partners of Aaron Ferer and Sons, plaintiff herein; that the remaining partners are Peggy Ferer, affiant's wife, and Robert Irving Ferer, affiant's son, and that affiant is in complete charge of the co-partnership business; that affiant carried on all of the negotiations between plaintiff and defendant pertaining to the sale by defendant to plaintiff of the equipment which is the subject matter of this litigation.

2. That the written contract executed by the parties hereto and which is the subject matter of this litigation, was drawn and prepared solely by defendant's attorney; that affiant was not represented by counsel in connection with the said written contract; that there was no mistake, mutual or otherwise, or

inadvertence in the preparation of said written contract; that there was no oral contract between the parties relating to the sale by defendant to plaintiff of the producing and refining facilities and equipment covered by said written contract; that there were brief preliminary discussions leading to the execution of said written contract, but that said written contract as executed is in strict compliance with said preliminary discussions.

3. That shortly before the execution of said written contract, affiant met with one Harold Davis, an employee of defendant, and Robert E. Paradise, the defendant's resident attorney, at defendant's premises, and that at said meeting, said Harold Davis and affiant informed said Robert E. Paradise of the desire of defendant to sell and plaintiff to purchase all of the producing and refining equipment and facilities at defendant's Casmelia property, except for certain specific items, which were then and there enumerated; that said Harold Davis requested said Robert E. Paradise to prepare a written contract covering said sale; *that none of the parties at said meeting* or at any other time prior to the execution of the written contract *made any mention whatsoever of the casing in the oil wells at said premises* or to any other specific pipe that was to be conveyed to plaintiff; that the *only items* of producing or refinery equipment or facilities which were specifically discussed or mentioned *were the items that were to be excluded* from the conveyance to plaintiff in the written contract as executed; *that none of the parties at said meeting* or at any other time prior to the execution of said written contract *said anything whatsoever with respect to limiting the subject matter of the sale to equipment or facilities on the surface of the land at defendant's*

premises. That the words 'on the surface' or any such or similar words were never even mentioned at said meeting or at any time prior to the execution of said written contract.

4. That after the meeting between said Harold Davis, Robert E. Paradise and affiant, said Robert E. Paradise prepared and submitted to affiant a draft of a written contract, purporting to set forth the transaction as it had been outlined at said meeting and there was contained in said draft the following provision:

'Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks now located on said land, all subject to the exceptions hereafter provided'

That affiant advised said Harold Davis and said Robert E. Paradise that in his opinion said clause might be construed as a limitation upon the understanding of the parties that the subject matter of the sale was to include ALL of the producing and refinery equipment and facilities except for the items specifically reserved, and affiant suggested that in order to obviate any such construction, the said clause be rewritten as follows:

'Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL AND LUMBER now located on said land, all subject to the exceptions hereinafter provided.'

That affiant's suggestion was accepted by said Harold Davis and said Robert E. Paradise without demurrer or equivocation, and the words "metal and lumber" were added to the clause as aforesaid and are contained in the written contract as executed.

5. That affiant never intended that the subject matter of the sale should be limited to production and refinery equipment and facilities ON THE SURFACE of the premises, or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that neither the defendant nor any of its employees, nor its attorney at any time prior to the execution of said written contract or for a long time thereafter, ever said or did anything whatsoever to indicate to affiant that the defendant intended the subject matter of the sale to be limited to production and refinery equipment and facilities ON THE SURFACE of the premises or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever.

That notwithstanding defendant's present contention that the casing or pipe in the oil wells was not to be included in the subject matter of the sale because it was not ON THE SURFACE of the premises, defendant has never questioned plaintiff's right under the written contract to remove a substantial quantity of pipe line which was underground and not ON THE SURFACE of the premises; that in truth and in fact, plaintiff was required to and did, dig trenches throughout the premises to remove such underground pipe.

6. That defendant at no time after the execution of the written contract ever stated to affiant or even intimated that a mistake, mutual or otherwise had been made in the preparation of said written contract by inadvertence or otherwise, until defendant included

allegations to that effect in its answer to the amended complaint on file herein; that in all of the discussions between affiant and defendant concerning the controversy which is the subject matter of this litigation, defendant simply contended that the written contract AS EXECUTED did not include the casing or pipe in the subject matter of the sale.

7. That affiant has never met and does not know Frank A. Morgan, one of the vice-presidents of defendant who verified the counter-claim or cross-complaint of defendant filed herein; that said counter-claim or cross-complaint in setting forth an alleged cause of action for reformation of the contract purports to show a definite oral agreement between plaintiff and defendant excluding the casing from the subject matter of the sale; said Frank A. Morgan by his verification, swore under oath that such an oral agreement was entered into with HIS OWN KNOWLEDGE; affiant is informed and believes and upon such information and belief deposes and says that the said counter-claim and cross-complaint was not verified by any of the employees of defendant who participated in the discussion of the transaction involved in this litigation for the reason that no such person could possibly swear under oath that an oral agreement as set forth in defendant's counter-claim or cross-complaint ever took place."

Affiant further sets forth that the averments contained in paragraph III of defendant's answer, in which it is alleged that plaintiff is in default under the written contract in having failed to remove brick, tanks and other property from defendant's premises, are untrue, because, affiant alleges, since the execution of said contract, the

parties executed an agreement extending plaintiff's time to remove said property and providing for the payment to defendant of a rental of $50.00 per month until the said work should be completed. Reference is made to a copy of said last named agreement, marked Exhibit "A" and the same is attached to said affidavit. [For said Exhibit A, see Clk. Tr. p. 65.]

The genuineness and due execution of Exhibit "A" were never disputed by defendant. Hence, the allegations of breach of contract by plaintiff contained in defendant's answer were admittedly sham.

Plaintiff's Motion for Summary Judgment Was Justified and Called for by the Court's Decision Denying Defendant's Motion to Dismiss.

The Court's denial of the defendant's motion to dismiss the amended complaint *invited* plaintiff's motion for summary judgment.

This is true because in denying the motion to dismiss the Court decided the only substantial issue presented by the defendant's answer and "counterclaim or cross complaint" and *determined that issue adversely to the defendant.*

Said answer had been served and was filed on January 12, 1942. [R. p. 54.] The claimant may move for summary judgment forthwith after service of an answer to his pleading. (Rule 54 (a) 3.1.) If the answer is sham or not substantial the motion is available. (Rule 56, 3.5.2.)

In further presenting the thesis indicated in the caption of this ground for reversal, appellant will first show, in the order to be named the following propositions:

1. That the decision denying the motion to dismiss determined that by the written instrument, which provides the subject matter of this action, the defendant sold and conveyed to plaintiff's the casings in all of the oil wells on defendant's premises;

2. That the defendant's answer raised no substantial issue other than the precise question thus determined by the denial of the motion to dismiss.

Defendant's Motion to Dismiss Compelled the Court to Decide Whether the Written Contract Was Clear and Unambiguous and Whether It Conveyed the Property in Controversy to Plaintiff, Which Question, the Court Decided.

The motion to dismiss avers, and was predicated on the proposition that "the contract . . . *does not by its terms provide for the sale by defendant to plaintiff of the casing installed in any of the oil wells located on the premises therein referred to,* nor does such contract give to plaintiff the right to remove such casing from any of such wells." [See Motion to Dismiss, R. p. 35.]

Defendant's motion, therefore called for and necessitated an interpretation of the contract, itself—wholly without regard to any extrinsic consideration.

Defendant implicitly averred that the contract was clear and unambiguous and that by its terms it excluded said casings in all oil wells on the property described in the contract. If this fact was in doubt declaratory relief was a proceeding expressly provided to avoid more pro-

tracted and expensive litigation. [R. 57 Fed. Rules of Procedure.] The sequence of events is important.

Plaintiff's motion for summary judgment was filed January 30th, 1942 [R. p. 55].

Prior thereto and on November 6th, 1941, defendant gave written notice of motion to dismiss plaintiff's amended complaint and notice of the hearing thereof [R. pp. 35, 36].

Pursuant to said notice said motion was argued on November 17th, 1941, and ordered submitted. [R. p. 37.]

On the 29th day of December, 1941, the court duly denied said motion to dismiss and accompanied its order with a "Memorandum of Conclusions." [R. p. 38.] On January 12, 1942 defendant's answer and counter pleading was filed. [R. p. 54.]

As above stated, defendant's said motion presented the issue and required the court to determine whether by the written contract, the defendant sold and conveyed to the plaintiff the casing in the oil wells on defendant's land described in said contract. Paragraph I of the motion reads:

> "To dismiss the amended complaint and both causes of action thereof on the ground that the amended complaint fails to state a claim against Richfield Oil Corporation upon which relief can be granted to the following reason: That the contract attached as Exhibit "A" to the amended complaint does not by its terms provide for the sale by defendant to plaintiff of the casing installed in any of the wells located upon the premises therein referred to, nor does such contract give to plaintiff the right to remove such casing from any of such wells."

The question thus presented is and was the only substantial issue in this law suit. By the "Memorandum of Conclusions" the court definitely determined this pivotal question; in that behalf it said: "The court concludes that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract." [R. p. 40.] This conclusion was reached, as the "Memorandum of Conclusions" shows, after the court had analyzed the first count of the amended complaint and the written contract (which was made a part of said pleading as "Exhibit A"), and after the court had construed all of the language and each of the provisions of the contract pertaining to the property sold and conveyed through that instrument. That the court so regarded the question presented by the motion to dismiss is unmistakably shown by the "Memorandum of Conclusions" itself.

Therein the court first recites that the "suit arises out of certain written contract, a copy of which is attached to the said amended complaint," and that, by the amended complaint the plaintiff "seeks a decree adjudging that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract, also adjudging that plaintiff is entitled to remove said casing from said wells and premises, and also adjudging that defendant be restrained from interfering with plaintiff's removal of said casing;" From this point on to the conclusion which has been quoted, the "memorandum" states the substance

of the pertinent provisions of the contract and construes them, emphasizing, the terms and language which clearly reveal the intention of the parties concerning the question presented by defendant's motion. We quote from the memorandum as follows:

> "It further appearing from the terms of said contract that defendant thereby agreed to sell to plaintiff, subject to said exceptions, ALL of the equipment and facilities located on said land, together with the pipe lines running from said land to a certain point, and including the boiler, boiler house, two corrugated iron tanks, pump and loading rack located at said point, said equipment and facilities thereby sold to include generally all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL and lumber located on said land; and
>
> "It further appearing from the terms of said contract, more particularly, paragraph one thereof, that certain specifically enumerated and described items of equipment and facilities were expressly excepted as not being sold to plaintiff; and
>
> "It further appearing from the terms of said contract that the casing in the oil wells was not enumerated or described among the items of equipment and facilities thus expressly excepted from said sale; and
>
> "It further appearing from the terms of said contract that plaintiff agreed at its sole expense to perform certain work, and that such work should include, among other things, the dismantling, removal and disposition of ALL equipment, facilities AND OTHER PROPERTY located on said land, EXCEPTING ONLY the items expressly excluded under the provisions of paragraph one of said contract; also that all work to be performed by plaintiff should be per-

formed in strict compliance with all rules, regulations and other requirements of the county of Santa Barbara, the State of California and of any other governmental authorities; and

"It further appearing from the terms of said contract that upon completion by plaintiff of all its duties, liabilities and obligations thereunder, defendant was required to execute and deliver to plaintiff a bill of sale covering ALL equipment and facilities to be purchased by plaintiff thereunder, which bill of should be in GENERAL terms only, inasmuch as no inventory of such equipment and facilities was in existence;"

It thus appears that Judge Holzer not only determined that the written contract constitutes a sale and conveyance of the disputed casings in the oil wells but shows by faultless reasoning, that the provisions of the formal agreement *which was drafted by defendant's attorney were plain and unambiguous.*

No Other Substantial Issue Was Presented by Defendant's Answer and "Counter-Claim or Cross-Complaint" Than the Exact Question Decided in the Denial of the Motion to Dismiss.

Appellant will now show, from defendant's pleadings filed in reply to the amended complaint that the assertion contained in the above caption is fully warranted. It will then appear that the "Memorandum of Conclusions," plus said reply pleadings, provided a perfect *prima facie* case for a summary judgment for the plaintiff, and entitled it to that judgment, unless overcome by evidence supplied by the counter affidavits and depositions produced by the defendant in opposition to the motion for summary judgment.

The answer admitted the execution of the written contract, "Exhibit A" attached to the amended complaint on January 17th, 1941; [Par. I, B., R. p. 42]; Paragraph 1-C of the answer admitted the existence, description and location of the oil wells; that they had been idle as alleged in the amended complaint, that the derricks and tubing and rods had been removed from the wells; that none of the wells were circled in red on the map attached to the contract, and, generally, the answer admitted all of the allegations of paragraph VI of the amended complaint, but qualified the admissions with averments, which if true, excluded the casings in all of the oil wells from the list of equipment sold and conveyed. Finally, said Paragraph I-C alleges as follows:

> "Defendant alleges that the casing and pipe installed in said wells was not indicated or shown on said map attached to the written contract and therefore could not be circled in red on said map. Defendant alleges that said map did not add to the subject matter of the contract any items of facilities or equipment not shown in red on such map but that said map was merely illustrative of certain of the exceptions as stated in the contract, to-wit, the facilities and equipment located upon the surface of the premises."

Hence, up to Paragraph II of the answer the only averments of the amended complaint which are challenged are those which show that the casings in the oil wells were sold and conveyed by the written contract, and this issue had been decided contrary to said averments by the "Memorandum of Conclusions." Paragraph III of the answer admits that plaintiff had paid $22,000.00, the full cash consideration required by the contract. [R. p. 44.]

Paragraphs II and IV, raise an issue as to lack of performance of the contract by plaintiff in the matter of removing brick and other articles from the premises, and, also, join issue on defendant's liability for damages as alleged in Paragraph IV of the amended complaint.

The last mentioned issues, were conclusively shown by "Exhibit A" attached to Morris Ferer's affidavit in support of the motion for summary judgment, to be sham and frivolous. [R. p. 65.]

Also, the question of the liability of the defendant for damages was merely incidental and within the jurisdiction of the court to determine on motion for summary judgment in deciding the substantive rights of the parties to the casing in the oil wells and its removal. However, as above shown, Ferer's affidavit in support of the motion for summary judgment excludes these incidental issues. Hence the answer presented no defense to the motion for summary judgment.

Plaintiff's "counter-claim and cross-complaint" presented no barrier to a summary judgment, for the following reasons:

1. The Court Had Determined in Denying the Motion to Dismiss That the Defendant Sold and Conveyed "All of the Casings in the Oil Well to the Defendants by the Written Agreement."

Except for one allegation, set forth in paragraph 1 of Count I of the counter-claim or cross-complaint, that pleading consists of averments of evidentiary facts and pure conclusions, which constitute an attempt to alter the terms of a written contract contrary to the rules of evidence and substantive law. In *Harding v. Robinson,*

Justice Hinshaw quotes with approval from *Pitcairn v. Phillips Hiss Co.* 125 Fed. 110 as follows:

> "According to the modern and better view, the rule which prohibits and modification of a written contract by parol, is a rule, not of evidence, but of substantive law."

The one allegation to which reference has been made reads:

> "That on or about January 17, 1941, plaintiff and defendant orally agreed to the sale by defendant to plaintiff, upon certain terms and condition and for the sum of Twenty-two Thousand Dollars ($22,000.00), of certain producing and refining facilities and equipment which were located upon the surface of certain premises owned by defendant."

The term "on or about" January 17, 1941, does not allege a *prior* oral agreement. All presumption and intendments require that this language be construed to refer to a time after January 17, 1941.

This is, of course, consistent with the general rule that a pleading is interpreted against the pleader where it is uncertain and indefinite.

But a more potent requirement applies equally. Every presumption and inference is contrary to a construction of any fact or circumstance which would destroy or alter a written instrument, deliberately executed. *Auerbach v. Healy*, 174 Cal. 60. *Burt v. L. A. Olive Grower's Assn.* 175 Cal. 668.

Upon the same grounds this further averment in the same paragraph that "to evidence said agreement the plaintiff and defendant executed a written agreement

dated January 17, 1941" cannot aid the uncertainty in the prior averment.

True, from the latter allegation it might be inferred that the oral agreement was made before January 17, 1941, or before the written contract was drawn, but this would necessitate adopting an inference against the integrity of the written instrument, whereas, the words "on or about" permit an interpretation which would safeguard it from alteration. It is also true that when interpreted as appellant insists it must be, these averments lead to an absurdity. Such a result is of little moment as compared with the importance of adherence to the doctrine and rule of pleading and evidence which circumscribed attacks, even in equity, upon the sanctity of "written instrument."

2. The Counter Claim or Cross-Complaint Had No Standing in Court.

It was *Frank A. Morgan,* one of the vice-presidents of the defendant who verified the "counter-claim or cross-complaint." Morris Ferer's affidavit avers that he, Ferer, "has never met and does not know Frank A. Morgan;" That Morgan "swore under oath that such oral agreement was entered into" within "His Own Knowledge" Ferer swore that he, Ferer, "carried on all of the negotiations between plaintiff and defendant pertaining to the sale by defendant to plaintiff of the equipment which is the subject matter of this litigation." [R. p. 59, 63.]

Later the defendant filed counter-affidavits of its officers and employees who did take some part, directly or indirectly, in the said negotiations or who had personal knowledge of them. We refer to the affidavit of F. L. McGahan [R. p. 83]; that of H. H. Kelly [R. p. 89]; a second affidavit by McGahan [R. p. 97]; Harold Davis'

affidavit [R. p. 93]. The defendant also took the depositions of Morris Ferer and of David Zeidenfeld, an employee of plaintiff, and of T. H. Clement, who witnessed a part of said negotiations.

Not one of these affidavits or depositions whose combined averments cover the range of the entire transaction from beginning to end, mention Frank A. Morgan; not one name him as being present upon any occasion when the subject matter of the contract was discussed with Aaron Ferer or anyone representing the plaintiff, or show that he had any connection, however tenuous, or through any implication, no matter how imaginative or fantastic, with the transaction. Therefore, the sworn statement by Frank A. Morgan in verifying defendant's counter-claim or cross-complaint that he knew *of his own knowledge* that defendant "orally agreed" upon "terms and conditions" which were different from those set forth in the written agreement *was palpably false.* Morgan did not know and could not have known *of his own knowledge* that any oral agreement was made prior to the written agreement.

Search the affidavits and depositions as we may, for an averment to replace the essential which defendants' sham pleading attempted to supply. Examine them sentence by sentence and word by word. We challenge opposing counsel to point out in any of the affidavits either an allegation that such an oral agreement was ever entered into, or a factual assertion from which that conclusion could be inferred.

For this situation subdivision (e) 3.5.3. of the present Rule 56, provides that the affidavits in support of a motion for summary judgment "shall show affirmatively that the affiant is competent to testify to the matters therein

states," and (e) 3.5.1. requires that the averments shall be on *personal knowledge*. Subdivision (e) 3.5.1., form of affidavits, make the same provision. [See Vol. III Ohlinger's Federal Practice pp. 720, 735, and p. 737.]

It necessarily results that appellant was fully warranted in making its motion for summary judgment; and that since the "counter-claim or cross-complaint," as well as the answer, was sham, defendant's pleadings provided no legal ground for opposition to said motion. Upon this ground alone the judgment should be reversed. However, it will be shown that the same conclusion results for other reasons.

The Defendant's Showing in Opposition to the Motion for Summary Judgment Was Wholly Insufficient to Provide a Basis for the Conclusion That Any Substantial Defense Had Been Presented:

Morris Ferer knew and appellant's counsel must have known that no competent proof could be produced and that no legitimate affidavit could be made by any person of *his own knowledge*, either directly or in substance or effect averring that any oral agreement was ever entered into between the parties to this action. Of course defendant's counsel was aware of the fundamental rule that the first requirement and condition precedent to reformation of a contract is proof of the existence of a prior agreement, oral or in writing, because, in order to state a cause of action for reformation, he attempted to set forth an averment to that effect in the "counterclaim or cross-complaint." Hence the counterclaim includes an averment of a prior oral agreement different from the written contract. However as against the motion for summary judgment and the affidavit in support thereof, the mere

averments in defendant's pleading was valueless without evidentiary support. The opposing affidavits and depositions are insufficient for the following reasons:

1. Defendant's said showing was legally inadequate to prove an oral agreement made prior to and different from the one sought to be reformed.

2. No competent evidence was adduced to show that plaintiff was ever apprised of defendant's alleged intention to exclude casings in oil wells from the sale.

1. Said Showing Was Legally Inadequate to Prove an Agreement Prior to the One Sought to Be Reformed.

The matter was tried on affidavits and depositions.

In the order in which the opposing affidavits appear in the record the one by F. L. McGahan comes first. [R. p. 83.] The affidavit states that "now and at all times mentioned herein" McGahan was supervisor of store houses for defendant and among his duties, he notified prospective bidders when the defendant "has determined that old or salvage equipment should be sold"; that during August or September, 1940, he informed David Zeidenfeld that Richfield Oil Corporation was planning to take bids for selling certain "surface equipment" at its Casmalia property and that affiant did not then have the items to be sold [R. p. 83]; that "subsequent to said conversation affiant" had a conversation with Morris Ferer in which affiant told Ferer that the equipment to be sold was "surface equipment" and that affiant had no inventory at that time but intended to visit the property and obtain a better idea of specific items to be sold, which informa-

tion would be available to Mr. Ferer [R. p. 84]; that subsequently and some time in the last week of November, 1940, affiant told David Zeidenfeld that he had "more information" about said equipment planned to be sold and showed Zeidenfeld "affiant's penciled memorandum and estimates" and discussed the items and affiant's estimate of tonnage, which was 1,500 tons, a portion of which represented "pipe lines" and the rest of which "represented the other surface equipment." [R. p. 85]; that affiant told Zeidenfeld that his estimate of tonnage might not be accurate; that he told Zeidenfeld that defendant was willing to sell all surface equipment, except certain items which affiant named, and that no mention was made of wells or casing in wells [R. p. 86]; that during the second week in January, 1941, affiant attended a meeting in the office of Mr. Paradise, an attorney for defendant, at which "Morris Ferer and T. H. Clements, Harold Davis and Paradise" were present. That Mr. Ferer asked to have the words "metal and lumber" added "to the proposed contract, and said that "additional material and loose metal and lumber laying around the property" should be included in the property to be sold" which the terms used in the proposed contract did not cover, to which request Mr. Davis agreed, stating that he understood that the articles named by Mr. Ferer were to be purchased by Ferer. That no mention was made at this meeting of casing in any oil wells [R. p. 87]: that Mr. Davis laid a map on the table and pointed out a gas line running from one oil well to the superintendent's house,

which line Davis said would be excluded from the sale so that the house might continue to be provided with gas. [R. p. 88.]

The Kelly Affidavit.

Next is the affidavit of H. H. Kelly, defendant's "Director of Purchases." The affidavit states that his duties included "making sales and the execution of contracts for the sale of old and salvage equipment" of defendant's property; that Harold Davis had "no authority to make sales of such nature or to execute contracts of sale of such nature"; that affiant "executed on behalf of" the defendant "the written contract dated January 1st, 1941" between defendant and plaintiff, and that several months before that date affiant notified Davis that "the management" had decided to sell certain "equipment on the Casmalia property and that Davis should arrange to get bids for the same [R. p. 89]; affiant repeatedly states that he at no time intended to sell casings in any of the wells, or to abandon any of the wells [R. pp. 90, 92]; that it had been and was defendant's intention to produce oil from wells on the property [R. p. 91]; that six large tanks, of the surface equipment, were excluded from the sale for the purpose of storing oil when the wells which had been capped should be restored to production; that affiant "examined carefully the written contract dated January 17, 1941. before he executed the same and that it was affiant's understanding that the phrase "metal and lumber" referred to loose scrap metal and loose lumber but did not include casing in any oil well. [R. p. 92.]

The Harold Davis Affidavit.

Harold Davis averred that:

That at all times mentioned he was employed by defendant and it was his duty to arrange "the preliminary negotiations for the sale by Richfield Oil Corporation of its salvage and worn out equipment" [R. p. 93]; that a meeting took place in his office on January 8, 1941, at which were present Messrs. Ferer and Clements and that affiant stated that Richfield management excluded six large tanks from the sale, to be used as storage if Richfield should decide to re-open the field, and affiant did not say that the tanks were to be moved to Maricopa; that affiant was present at a meeting in Mr. Paradise's office, present also were Messrs. Ferer, Clements, McGahan and Paradise [R. p. 94]; Mr. Ferer asked to have loose lumber and loose metal lying around on the property included in the sale, and referred to a scrap pile of wire and cast iron and metal supports for the shell stills around the refinery to be moved by "the Casmite Company"; that affiant stated that it was his understanding that Messrs. Ferer and Clements were to get such articles and it would be satisfactory to include them; that no one mentioned the casings in any oil wells and that affiant asked Mr. Ferer what he referred to when he asked the inclusion of the phrase "metal and lumber" in the proposed contract [R. p. 95]; that affiant pointed out on a large map the gas line leading from one well to the superintendent's house and said that it was to be excluded from the sale, and if the gas was not enough to supply the house, other lines might be excluded for that purpose. [R. p. 96.]

McGahan's Second Affidavit.

F. L. McGahan made a second affidavit. [R. pp. 97, 98.] In this he denied that prior to January 17, 1941, he had stated to T. H. Clements that "everything on the property would be sold, with certain exceptions" and avers that he stated to said Clements "that the 'surface equipment' with certain exceptions would be sold."

Affiant denies that he told Clements that storage tanks at Casmalia were to be taken by Richfield to be used at Maricopa [R. p. 97]; denies that Clements ever asked affiant for an inventory of the equipment at Casmalia to be sold; denies that affiant told Clements that he had no inventory but would visit Casmalia and get more information. [R. p. 98.]

These Affidavits Do Not Even Hint at a Prior Oral Agreement.

Surely, it cannot be rationally contended that the foregoing affidavits establish an oral contract prior to the one drawn by the defendant's attorney, Mr. Paradise, dated January 17, 1941. Nothing whatever except preliminary negotiations are set forth in any of these affidavits. McGahan's first affidavit as it relates to conversations with Mr. Zeidenfeld shows hardly the beginning of a deal. The first conversation amounted to nothing more than saying that a certain indefinite type of property was apt to be for sale.

The substance of the conversation in November or December was that McGahan said the property would be sold later, but supplied no information on which a bid could be based. His second affidavit shows that he merely had "more information" than on the first occasion, at

which time he had none. The affidavit says a penciled memorandum was shown Zeidenfeld and that "the items" were discussed. All intendments being against any inference or interpretation in aid of an attack upon the written instrument, it cannot be inferred that the added information was material or that the discussion supported defendant's claims herein. It might be classed properly as a cautious sales talk to arouse interest; McGahan, of course, knew that Zeidenfeld's employer was interested in tonnage. Hence on this one point McGahan gave an estimate. No other information approached definiteness in any respect; except for the term "surface equipment" nothing else claimed by McGahan to have been said by him could have any materiality in this case.

Of course, to give these conversations any relevancy would require proof that Zeidenfeld communicated what was said to his employer, because none of the affidavits showed that Zeidenfeld went forward with actual negotiations, and they show that he did not participate in shaping up the sale; also, there is no showing that Zeidenfeld had any authority to negotiate for Ferer & Sons, much less to contract for the plaintiff.

McGahan's alleged statement to Mr. Ferer that the property to be sold was "surface equipment" is of practically no significance as it is stated in the affidavit. The date on which it was made is highly important. If this information had been given immediately before January 17th, 1941, when the contract was about to be drafted, it might possibly put Mr. Ferer on inquiry, although Kelly's affidavit proves that McGahan had no authority to represent Richfield otherwise than to *notify prospective bidders when the Richfield corporation had determined*

that old or salvage equipment should be sold. He so stated in his own affidavit, and no one contradicted him.

However, McGahan's affidavit merely states that "subsequent to the last mentioned conversation with David Zeidenfeld" (the one in August or September) McGahan had a conversation with Morris Ferer. Hence, this conversation with Ferer may have been in September or even in August, and the *court was required to presume that it occurred at such an early date,* because where reformation of a written contract is sought *every presumption or inference* is against the party who claims that it was entered into by mutual mistake. Being thus presumed, the negotiation stage had *not* been reached in this transaction.

McGahan's second affidavit is wholly immaterial because no one intending to buy equipment from Richfield was required to pay attention to anything said about the details of a transaction by an employee whose authority extended only to the notification of prospective buyers that property was to be sold. Why should Clement ask such an employee for an inventory when the person authorized to make such sales was Kelly? Also, for all McGahan's, or any of the other affidavits show, Clements may have secured all of the information which he desired through other Richfield officials and by his own inspection. McGahan's statements as to how the term "metal and lumber" came to be inserted in the proposed draft might be material if the "counter-claim or cross-complaint" was based on alleged fraud, but it fails to supply an atom toward making up the clear and convincing evidence which is essential in order that words may be deleted from a written instrument, deliberately executed, where mistake is averred. (Cite cases.)

The Kelly's Affidavit.

H. H. Kelly's affidavit is relevant and material, even though self-serving, as tending to show that he, as the Richfield official who executed the contract herein involved, did not intend to convey casings in the oil wells. Beyond and aside from this one fact, Mr. Kelly's affidavit helps not at all in the attempt to make out a substantial claim that the said contract should be reformed.

The weight of this affidavit, even for the purpose above indicated, is reduced to a minimum, because Mr. Kelly's affidavit shows that "the managament" and not Kelly decided what should be sold and what equipment should be excluded from the sale, and his assertion in the affidavit concerning the decision and intention of "the management" has no foundation by way of showing that he knew or could have known such intention or decision, and the court had no right to infer or presume anything in support of an attack upon this written instrument, deliberately executed; Mr. Kelly avers that he read the contract carefully before he signed it, from which it must be inferred that it was Richfield's intention that said contract as worded, should convey all property not expressly excluded.

The Harold Davis Affidavit.

Harold Davis swore that his duty was to act as *preliminary negotiator* for the sale of salvage or worn out equipment for Richfield. [R. p. 93.] This fact substantiates the contention, already made, that McGahan dealings were not even in the negoiation class.

According to the defendant's affidavits, taken together, McGahan merely sent out notices to prospective bidders that sales were to be made; Davis conducted preliminary

negotiations and Kelly closed the deals and executed the contracts under directions from "the management," and no affidavit pretended to say what or who made up "the management."

The statement to Clements and Ferer which Davis said he made, that six large tanks were excluded from the sale to be used for storage if Richfield should decide to re-open the field, merely tends to show that Richfield might have been undecided as to whether it would ever re-open the field. Assume that this was true; suppose that Clements and Ferer knew that this was the state of mind of the Richfield management; even assume that some authorized person had said to Clements and Ferer: Richfield intends to re-open the Casmalia field if and when prices of its low grade oil will make it profitable, in what possible manner would that information concern a prospective purchaser of equipment which Richfield was offering to sell? Since what date or era in the development of the common law has the responsibility of guardianship of a vendor been saddled on the vendee? Did Ferer and Clements owe some duty, perhaps, to Richfield stockholders, to unravel the intricacies of the Richfield organization set up, and to find out who constitutes "the mnagement" and then to warn such personnel that it would not be advisable to sell well casings unless it had been finally and conclusively determined that the Casmalia field should be forever abandoned and rendered desolate like the sacred soil of Prussia before an advancing Russian Army?

Truly, the sublimity of the standard of business ethics necessarily assumed to impute any material meaning to knowledge upon defendant's part that Richfield manage-

ment might sometime re-open a field which had been closed for a decade, arrives within the realm of the ridiculous when regarded in the light of common knowledge and experience in the buying and selling of goods of any character. For similar reasons the fact that Richfield was retaining a gas line from a well to the Superintendent's house cannot rationally be regarded as an indication that Richfield did not intend to sell the casings from the capped oil wells. To the head of a concern whose business it is to buy discarded equipment containing metal wherever it is for sale, the vendor's reasons for selling one article and retaining another go in one ear and out of the other as so much tedious talk. It must be remembered that all of these defense affidavits were filed in answer to the affidavit of Morris Ferer in support of plaintiff's motion for summary judgment. In Ferer's affidavit [R. pp. 59, 60], he swore that upon the very occasion referred to by Davis, "said Harold Davis and affiant informed said Robert E. Paradise of the desire of the defendant to sell and plaintiff to purchase *all of the producing* and refining equipment and facilities at defendant's Casmalia property, except for certain items which were then enumerated; that said Harold Davis requested said Robert E. Paradise to prepare a written contract covering said sale; *that none of the parties at said meeting* or at any other time prior to the execution of the written contract *made any mention whatsoever of the casing in the oil wells at said premises* or of any other specific pipe that was to be conveyed to plaintiff; that the *only items* of producing or refinery equipment or facilities which were specifically discussed or mentioned *were the items that were to be excluded* from the conveyance to plaintiff in the written contract as executed.

Harold Davis made and filed his affidavit and he failed to deny the foregoing averments in Mr. Ferer's affidavit. Mr. Paradise filed no affidavit and, of course, failed to deny said averments by Mr. Ferer. Even without the aid of the rule which requires that all intendments must be favorable to upholding the integrity of a written instrument the total failure to deny by both Davis and Paradise compels the conclusion that Ferer's said averments are true. Such being the condition of the negotiations during this meeting, held just prior to the drafting of the written agreement, such circumstances as the gas line conversation and the possibility that Richfield might sometime re-open the Casmalia field, shrivel into the mere shadow of a speck as evidence of anything material in this case—the material facts being that defendant did not intend to convey the oil well casings and that plaintiff knew or suspected such lack of intention on the part of the Richfield management. As circumstances tending to prove the oral agreement alleged in defendant's sham pleading, they are nil.

Harold Davis' affidavit also asserts that no one at this meeting "mentioned the casings in any oil wells." In this instance Ferer's affidavit contains the same statement. Whose business was it to mention the casings since Ferer understood and the contract as drawn provided that they were to be included in the conveyance as a part of the producing equipment, *all* of which was to be sold, *unless expressly excluded?* Davis understood the same thing, which understanding on his part was fully proven by Ferer's *undenied* affidavit. Obviously there was no occasion for Ferer or Clements to mention casings in oil wells, and it is just as clear that, under the

above circumstances, the failure of Davis to name such casings among the excluded articles was an implied representation that they were to be sold and conveyed.

This concludes our analysis of the affirmative allegations of the defendant's opposing affidavits and of the material negative assertions therein.

However, the failure of the defendant through its affidavits to deny other averments in the affidavit of Morris Ferer totally eliminates the purported issues raised through the answer and "counterclaim or cross-complaint," as constituting any substantial barrier to the entry of summary judgment in favor of the plaintiff.

The undenied averments of Mr. Ferer's affidavit are:

> ". . . that affiant carried on all of the negotiations between plaintiff and defendant pertaining to the sale by defendant to plaintiff of the equipment which is the subject matter of this litigation.
>
> "2. That the written contract executed by the parties hereto and which is the subject matter of this litigation, was drawn and prepared solely by defendant's attorney; that affiant was not represented by counsel in connection with the said written contract; that there was no mistake, mutual or otherwise, or inadvertence in the preparation of said written contract; that there was no oral contract between the parties relating to the sale by defendant to plaintiff of the producing and refining facilities and equipment covered by said written contract. . . .
>
> "3. That shortly before the execution of said written contract, affiant met with one Harold Davis, an employee of defendant, and Robert E. Paradise, the defendant's resident attorney, at defendant's premises, and that at said meeting, said Harold Davis

and affiant informed said Robert E. Paradise of the desire of defendant to sell and plaintiff to purchase all of the producing and refining equipment and facilities at defendant's Casmelia property, except for certain specific items, which were then and there enumerated; that said Harold Davis requested said Robert E. Paradise to prepare a written contract covering said sale; *that none of the parties at said meeting* or at any other time prior to the execution of the written contract *made any mention whatsoever of the casing in the oil wells at said premises* or to any other specific pipe that was to be conveyed to plaintiff; that the *only items that were to be excluded* from the conveyance to plaintiff and that *all of the items* so specifically mentioned *were excluded* from the conveyance to the plaintiff in the written contract as executed;"
* * *

"4. That after the meeting between said Harold Davis, Robert E. Paradise and affiant, said Robert E. Paradise prepared and submitted to affiant a draft of a written contract, purporting to set forth the transaction as it had been outlined at said meeting and there was contained in said draft the following provision:

" 'Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors and tanks now located on said land, all subject to the exceptions hereafter provided.'

That affiant advised said Harold Davis and said Robert E. Paradise that in his opinion said clause might be construed as a limitation upon the understanding of the parties that the subject matter of the sale was to include ALL of the producing and refinery equipment and facilities except for the items

specifically reserved, and affiant suggested that in order to obviate any such construction, the said clause be re-written as follows:

" 'Said equipment and facilities so to be sold include all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL AND LUMBER now located on said land, all subject to the exceptions hereinafter provided.'

That affiant's suggestion was accepted by said Harold Davis and said Robert E. Paradise, without demurrer or equivocation, and the words 'metal and lumber' were added to the clause as aforesaid and are contained in the written contract as executed.

"5. That affiant never intended that the subject matter of the sale should be limited to production and refinery equipment and facilities ON THE SURFACE of the premises, or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that neither the defendant nor any of its employees, nor its attorney at any time prior to the execution of said written contract or for a long time thereafter, ever said or did anything whatsoever to indicate to affiant that the defendant intended the subject matter of the sale to be limited to production and refinery equipment and facilities ON THE SURFACE of the premises or that the subject matter of the sale should not include the casing or pipe in the oil wells on said premises; that if defendant intended that the subject matter of the sale was to be so limited or was not to include said casing or pipe, affiant had no knowledge of such intention or any suspicion thereof whatsoever.

"That notwithstanding defendant's present contention that the casing or pipe in the oil wells was not to be included in the subject matter of the sale because

it was not ON THE SURFACE of the premises, defendant has never questioned plaintiff's right under the written contract to remove a substantial quantity of pipe line which was underground and not ON THE SURFACE of the premises; that in truth and in fact, plaintiff was required to and did, dig trenches throughout the premises to remove such underground pipe.

"6. That defendant at no time after the execution of the written contract ever stated to affiant or even intimated that a mistake, mutual or otherwise had been made in preparation of said written contract by inadvertence or otherwise, until defendant included allegations to that effect in its answer to the amended complaint on file herein; that in all of the discussions between affiant and defendant concerning the controversy which is the subject matter of this litigation, defendant simply contended that the written contract AS EXECUTED did not include the casing or pipe in the subject matter of this sale.

"7. That affiant has never met and does not know Frank A. Morgan, one of the vice-presidents of defendant who verified the counter-claim or cross-complaint of defendant filed herein; that said counter-claim or cross-complaint in setting forth an alleged cause of action for reformation of the contract purports to show a definite oral agreement between plaintiff and defendant excluding the casing from the subject matter of the sale; said Frank A. Morgan by his verification, swore under oath that such an oral agreement was entered into with HIS OWN KNOWLEDGE; affiant is informed and believes and upon such information and belief deposes and says that the said counter-claim and cross-complaint was not verified by any of the employees of defendant who participated in the discussion of the transaction involved in

this litigation for the reason that no such person could possibly swear under oath that an oral agreement as set forth in defendant's counter-claim or cross-complaint ever took place.

"4. That defendant's allegation that plaintiff is in default under the terms and provisions of the written contract is untrue; that the written contract provides that if plaintiff does not remove the equipment which is the subject matter of the sale within six months from the date of the execution of the said written contract, plaintiff shall be required to pay the defendant rental for the premises until the work has been completed, at the rate of $50.00 a month; that defendant orally agreed to waive said rental when, for certain reasons beyond the control of plaintiff it became apparent that plaintiff would require more than six months time in which to perform said work; that the period for which the said rental was to be so waived by defendant was not definitely fixed by the oral agreement aforesaid, but plaintiff and defendant entered into a written agreement on or about the 6th day of January, 1942, wherein it was agreed that plaintiff would have until the 7th day of March, 1942, in which to complete said work, and if not completed, plaintiff would thereafter be required to pay defendant rental at the rate of $50.00 a month until the work was completed; a copy of said written agreement is hereto attached, marked 'Exhibit A' and made a part of this affidavit by reference.

Morris Ferer (Sgd)."

[R. pp. 59-66.]

Then followed said "Exhibit A", dated January 6, 1942, which stipulates that if Ferer & Sons shall not have removed the property purchased by March 7, 1942, the said purchaser should pay the seller $50.00 per month

for as long a period "as is required to do all the work above referred to," and it was stipulated that failure of defendant to set forth any claim against plaintiff for damages by reason of plaintiff's failure to remove said property as agreed in the written contract in any counter-claim or cross-complaint to be filed in the instant action would not be a waiver of defendant's claim thereto, said "Exhibit A" being signed by both plaintiff and defendant herein.

Appellant insists that the foregoing undenied averments must be accepted as true; that the trial court disregarded them; that had it done otherwise a summary judgment was compelled as a matter of law. The compulsion of law necessarily results from the following legal propositions:

It is held by the Supreme Court in *Fidelity & Deposit Company v. United States,* 187 U. S. 315, 47 Fed. 194, that undenied statements made in affidavits to support or oppose a motion for summary judgment are to be taken as true. Also, so holding, are *Griffith v. Mass. Mutual Life Insurance Co.,* 96 F. (2d) 57 (C. C. A. 2); and *Bernstein v. Kritzer,* 224 App. Div. 287, 231 N. Y. S. 97. And the following principles of law which are directly applicable: Evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, or incredible, cannot be arbitrarily or capriciously discredited, disregarded or rejected, even though the witness is a party or is interested. (*Caldwell v. Weiner,* 203 Cal. 543, 264 Pac. 1100; *Lejeune v. Gen. Pet. Co.,* 128 Cal. App. 404, 18 Pac. (2d) 429; *Rogers v. Burnham,* 140 Cal. App. 366, 35 Pac. (2d) 329; 32 *C. J. S.* 1089, 1090, 1091.)

Uncontradicted testimony of a witness to a particular fact should be accepted by the court as proof of such fact.

(*Davis v. Judson,* 159 Cal. 121, 113 Pac. 147, 150.) To same effect, *Briggs v. Cameron* (Cal. App.) 295 Pac. 347, 349; *Sun Maid etc. v. Papazian* (Cal. App.) 240 Pac. 47, 50; *Hutchison v. Holland,* 47 Cal. App. 710, 190 Pac. 1072, it is said: "Where testimony of the defendant stands uncontradicted and his statements are not inherently improbable a trial court is not authorized to disregard them." The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason. (C. C. P., Sec. 1844.)

The written agreement speaks for itself. No more convincing or authoritative source can be quoted to show that, by clear and unambiguous language it purports to convey the casing in all of the oil wells on the Casmalia property, than Judge Holzer's memorandum opinion, rendered in denying defendant's motion to dismiss the amended complaint. In construing said contract, Judge Holzer said:

> "It further appearing from the terms of said contract that defendant owned the refinery and producing facilities and equipment located on said land, that plaintiff desired to buy such equipment and facilities, subject to certain exceptions more particularly set forth in said contract, that defendant was willing to sell the same upon the condition that plaintiff should dismantle and remove the same in accordance with the terms set forth in said contract; and
>
> It further appearing from the terms of said contract that defendant thereby agreed to sell to plaintiff, subject to said exceptions, ALL of the equipment and facilities located on said land, together with the pipe lines running from said land to a certain point,

and including the boiler, boiler house, two corrugated iron tanks, pump and loading rack located at said point, said equipment and facilities thereby sold to include generally all pipe lines, valves and fittings, buildings, boilers, pumps, engines, motors, tanks, METAL and lumber located on said land; and

It further appearing from the terms of said contract, more particularly, paragraph one thereof, that certain specifically enumerated and described items of equipment and facilities were expressly excepted as not being sold to plaintiff; and

It further appearing from the terms of said contract that the casing in the oil wells was not enumerated or described among the items of equipment and facilities thus expressly excepted from said sale; and

It further appearing from the terms of said contract that plaintiff agreed at its sole expense to perform certain work, and that such work should include, among other things, the dismantling, removal and disposition of ALL equipment and facilities to be purchased by them, also the filling in and leveling off of all ditches and pits created by their work in removing pipe or other equipment, also that in addition plaintiff should remove from said land ALL equipment, facilities and OTHER PROPERTY located on said land, EXCEPTING ONLY the items expressly excluded under the provisions of paragraph one of said contract; also that all work to be performed by plaintiff should be performed in strict compliance with all rules, regulations and other requirements of the

county of Santa Barbara, the state of California and of any other governmental authorities; and

It further appearing from the terms of said contract that upon completion by plaintiff of all its duties, liabilities and obligations thereunder, defendant was required to execute and deliver to plaintiff a bill of sale covering ALL equipment and facilities to be purchased by plaintiff thereunder, which bill of sale should be in GENERAL terms only, inasmuch as no inventory of such equipment and facilities was in existence;

It further appearing from the affidavit of one H. H. Kelly, filed herein on behalf of defendant, and from the statement made by defendant's counsel in open court, that defendant has notified plaintiff that the former contends that it did not sell to plaintiff said casing, also contends that plaintiff is not entitled to remove said casing, and has also notified plaintiff that defendant intends to and will prevent plaintiff from removing said casing; and

It further appearing that by the second count of said amended complaint plaintiff seeks damages against defendant for its alleged breach of the aforementioned contract; and

It further appearing from the statement made by defendant's counsel in open court that said contract was drafted and prepared by defendant;

The Court concludes that under the terms of said contract the defendant sold and conveyed to plaintiff the casing in the oil wells on defendant's land described in said contract."

Summary.

It has been shown that defendant's answer and "counterclaim or cross-complaint" attempted to avoid the effect of said memorandum opinion and the averments of the amended complaint solely by seeking to reform said contract on the sham ground of a formal oral agreement and mutual mistake and the equally sham averments of damages for plaintiff's delay in removing the purchased property.

It has further been pointed out that defendant's answer and counter-claim or cross-complaint could perform no function for any purpose. They raise no issue. They were verified by a person who, it is conclusively shown, had no personal knowledge of the averments contained therein and was not qualified to testify as to the matters therein set forth, rendering said pleadings frivolous and sham. (Rule 56 (3.7), Federal Rules of Procedure.)

It has been shown, item by item, that the facts and circumstances set forth in defendant's affidavits in opposition to plaintiff's motion for summary judgment, are either meaningless or susceptible of an interpretation which upholds the written contract and which is wholly inconsistent with the existence of the verbal agreement described in defendant's pleadings.

The undenied averments of the affidavit of Morris Ferer alone, preclude the inference or conclusion that such a verbal agreement was ever enterd into by the parties and fully support the written contract as expressing the true intention of both parties.

There remains only the depositions of Morris Ferer, T. H. Clement and David Zeidenfeld to be considered to complete the record upon which the motion for summary

judgment was denied. It will readily appear that these depositions help defendant's cause not at all, but do add substantially to the proof that no prior oral agreement at variance with the written contract was ever created by the parties hereto.

The Depositions.

Mr. Zeidenfeld's deposition occupies pages 616 to 712, inclusive, of the Record. Very little of it need be quoted to show: 1. That Zeidenfeld had no authority to bind the plaintiff; and no statement made by him could constitute notice to plaintiiff; 2. That his part in the transaction did not reach the stage of negotiation; 3. That he conveyed no material information to plaintiff.

Direct examination by Mr. Paradise:

Mr. Zeidenfeld testified that during 1940 and 1941—

> "I was employed by Aaron Ferer & Sons as buyer of scrap material [R. p. 617]; about the middle of September, 1940, I had a conversation with Mr. McGahan; he said, 'I think we are going to have a pretty good size deal to work on . . . it isn't exactly ready yet, but I will let you know when it comes up.' All I remember at that time that Mr. McGahan mentioned was our oil refinery. At that time there was supposed to be a lot of various types of refinery and producing equipment. [R. pp. 618, 619.] I remember saying to Mr. Ferer that there was a Richfield deal coming up, a fairly good sized deal, but nothing about Casmalia. [R. p. 623.] I don't think it, the conversation, took 30 seconds. It was just dropped until a future date. [R. p. 629.]

Another conversation with Mr. McGahan occurred on November 28, 1941; I was there on another deal. The nature of the equipment that was mentioned was a lot of pipe, pipe lines was mentioned. [R. pp. 626, 627.]

I believe he mentioned the refinery has a lot of pipe lines and other items to be sold; I don't think the word, 'surface equipment' was ever used. [R. p. 629.] I don't believe I heard the mention of casing at that time. The word 'pipe' itself, to an average fellow in the junk business, whether casing or just a line of pipe is designated, it is so many tons of pipe [R. p. 630]; I don't remember the words 'surface equipment' being used by Mr. McGahan. [R. p. 631.]

Mr. McGahan showed me those sheets (reference being to ten penciled memo sheets). He had them in his book. I remember the total estimate, 1,500 tons; I was primarily interested in this 1,500 estimate [R. p. 635]; to tell you the truth, I did not know the difference between pipe line and casing at that time; just a few days ago I was told that casing was casing in oil wells. I have heard "casing" used many times. I am not exactly an oil man, and I never knew a lot of terms, and I can't determine whether it is pipe that goes up and down, or goes straight across. I wouldn't say the pages were all shown to me, he might have thumbed through all of them, but I took no heed of how many pages there were [R. p. 645]; I kept repeating over and over to him 'how many tons are there?' He showed me the pages; I saw just two or three of them. [R. p. 643.] Mr. McGahan stated, roughly there was 1,500 tons of both steel and pipe. [R. p. 648.] After this conversation I think I spoke to Mr. Ferer about so many tons of pipe up there, and so many tons of steel. [R. p.

651.] I think this was before the bid was submitted to Richfield. I knew the bid was submitted after it was submitted. [R. p. 652.] A week or maybe two weeks after that I mentioned to Mr. Ferer that it would take somewhere around $20,000. I just came into the office where he and Mr. Clements were discussing certain things. [R. p. 653.] There was not any mentioned of tonnage. I think at that time I was out of the picture entirely. I was not consulted about it." [R. p. 654.]

Cross-examination by Mr. Sturzenacker:

"I was never at the Casmalia property [R. p. 658]; in the second conversation with Mr. McGahan the tonnage figures he gave me were merely an estimate; he told me if Ferer & Sons were interested they should go up and look at the property; he gave me the route to take up there. [R. p. 661.] I did not go with Mr. Ferer to see the property. [R. p. 670.] I think I told Mr. Ferer, if he was interested in this deal, I would go and look at it, *but I think somebody else entered the picture and either that somebody had gone and looked at it already.* It is a fact that after my casually mentioning this possible deal to Mr. Ferer, he carried on his negotiations and the purchase in connection with the deal, *without me;* the day after he was up there I heard about it. After that he had no discussions with me [R. p. 670]; Mr. McGahan did tell me that there were a few things on the property that Richfield did not want to sell [R. p. 673]; I don't recall anything mentioned of pipe in oil wells. I am sure that did not take place. I don't

think we discussed anything about 'on top or under' at all. There was no mention concerning oil wells on the property." [R. p. 675.]

Redirect examination:

"When Mr. McGahan gave me his estimate of 1,500 tons, it was 900 tons of pipe lines and the balance approximately 600 tons of steel. [R. p. 680.] In reference to what Mr. McGahan told me about pipe lines, there was no mention of vertical or horizontal." [R. p. 695.]

The greater part of Mr. Zeidenfeld's deposition is consumed by answers to questions as to what he understood, and what he "pictured in his mind" and to his inferences and assumptions from what Mr. McGahan said to him. These answers have been omitted, because, since neither from his testimony or from any other source is there the slightest evidence that Mr. Zeidenfeld communicated his understanding, or inferences or presumptions or mental visions to anyone, all such testimony is and was so palpably incompetent that no jurist could be charged with having considered it. Concerning the material matters the foregoing is the substance of Mr. Zeidenfeld's deposition. We do not apprehend that opposing counsel will claim that Mr. Zeidenfeld took any material part in the negotiations or that plaintiff is bound or affected in any way by his mental pictures or understandings. Nothing that transpired between him and Mr. Ferer can cast any light upon the latter's understanding or intentions.

The Deposition of T. H. Clements.

Direct examination by Mr. Paradise:

"I am sole owner of the Refinery Equipment Company, second-hand dealer in machinery, pipe, etc., and buy and sell junk equipment. Aaron Ferer & Sons is more or less competitive to our business. My interest in this transaction was as a promoter, sharing in the profits. [R. pp. 713, 714.] I have a written contract with Morris Ferer. I get 33⅓% of the profits, providing the equipment and trucks for the salvage work. [R. p. 715.] I have the histories and drillers' reports of the Richfield wells on the land described in the contract dated January 17, 1941; also the log books and the records of production and records of plugging [R. pp. 720, 721]; I examined them while negotiations for this contract was going on [R. p. 723]; I had discussed the desire of Richfield to sell equipment from the property for 3 or 4 years with Mr. McGahan, and with Mr. Davis, who I was buying equipment through [R. p. 727]; around September, 1940, Mr. Davis told me he was having Mr. McGahan make out an inventory and would be ready to take bids afterward; some time in November he told me to contact McGahan [R. p. 729]; I talked with McGahan in December, 1940. He said they wanted to sell everything except six big storage tanks and some equipment that had been sold [R. p. 730]; he said they wanted to take the six tanks to Maricopa. Next I called Mr. Ferer and asked if he would be interested in the deal. He said yes. [R. p. 731.] Mr. Ferer and I inspected the property about the middle of December, 1940. We spent a whole day. We examined the various tanks. We figured steel plate at $15.00 a ton [R. pp. 734, 735]; we estimated an over-all tonnage of about 6,000 tons,

metal materials. We didn't figure the tanks in that. [R. pp. 737, 738.] Our top figure was about 6,000 and minimum of 3,000 to 3,500 tons. When we figured pipe in those wells it was indefinite; we might get 50,000 feet out of 100,000 feet [R. p. 741]; there was a lot of scrap pipe and loose cable. We didn't figure the galvanized material as loose; we figured to sell it as buildings. [R. p. 743.] In our conversation with Mr. Davis those steel settings, 8-inch back stays was included in the sale. It was stipulated. It occurred the last time in your presence at this desk [R. p. 744]; the vast majority of the casings was 10 inch pipe, by the drilling logs [R. p. 747]; we checked the blueprint and counted the wells and verified their existence; used the map Duncan gave us [R. p. 749]; we based our estimate of 50,000 feet recoverable on the amount we could get out of the well and still comply with the abandonment program set forth by the State Bureau of Mines, their rules and regulations. [R. p. 752.] The number of wells was around 60 or 67 [R. p. 754]; we figured 50 wells for certain [R. p. 762]; I was never told at any time that Richfield intended to retain the wells or the casing in the wells. [R. p. 769.] The wells were not abandoned when Anderson tore down the derricks and pulled the tubing. [R. p. 769.]

He couldn't use the same rigging to remove the casings [R. p. 771]; I participated with Mr. Ferer in determining the sum of $22,000 to be offered to Richfield for the equipment and facilities to be sold; as to how we arrived at that figure—the initial investment isn't all cost in removal of that sort. Your abandoning operations cost you a considerable amount of money and we looked it over and determined what we thought we could realize back in dollars and cents and how much we could afford to gamble on it. After

all, it is a gambling operation. You don't know the nature of all of your underground piping and you can't even tell about all of the things that you do look at, as to whether it will be merchantable merchandise or not. [R. p. 780.] I have forgotten what we figured it would cost to clean up the property. We were gambling on this [R. p. 782]; we figured to make a profit of $50,000 to $60,000 on this deal. [R. p. 785.]

In our discussion with any Richfield representative no mention of the casings in the wells was ever mentioned. [R. p. 786.]

We estimated the cost of abandoning the wells in the general cost [R. p. 787]; when you go into a well to remove the casing it is like a pig in a poke. You just work on the law of averages [R. p. 796]; the oil produced at Casmalia is very heavy gravity [R. p. 797]; I didn't know whether the field was entirely depleted when they stopped producing in 1925 or 1926 [R. p. 798]; if we bought everything on the property in the way of pipe, there was no obligation as to abandonment, as long as we had paid cash for it, between ourselves and Richfield. The obligation would be to straighten out any difficulties in the abandonment between ourselves and the Bureau of Mines. [R. p. 803.]

When the Richfield say they want to sell everything on the property and they are going to go ahead and make a good piece of cattle grazing land out of it and are even going to take the storage tanks off of the property—the idea of considering it as a future, potential source of oil never entered our heads.

In your contract there it stipulates that you have got to be very careful to keep the fences up for cattle.

What I have stated was the conversation held in this room and you were present. Mr. Davis and Mr. Ferer and myself were present.

If the property was going to be used for oil production, why would they remove from it production tanks, pipe lines, loading rack facilities, boiler facilities and house facilities? Why would everything be removed from the property?

Those are the questions that led us to form definite conclusions. I was acquainted with the conditions of those boilers and tanks at the time this contract was made.

The pipe lines were perfect. Tanks, some were good and some were bad. The boilers for the purpose for which they were used primarily, which was for heating purposes on these gut lines, some could be used another 50 years. Most of the boilers had been put in there from 1917 to 1925. I didn't think that the Richfield considered the field as undepleted. I thought that was a fifth wheel they had accumulated from the Doheny interests when they bought it over and that they were sorry they had it. [R. p. 808.]

I read the contract right here along with Mr. Ferer at the time it was signed [R. p. 813]; Mr. McGahan never pointed out the excluded gas lines before or after the contract was signed [R. p. 814]; I asked McGahan for an inventory but he said, 'I can't give you one.' He never did [R. p. 815]; neither McGahan nor Davis ever stated to me that those six excluded tanks were to be left on the property for future production purposes. I recall but one conversation when you were present. We had a prior meeting in Mr. Davis' office, Mr. Ferer, Mr. Davis, myself and perhaps Mr. McGahan were present [R.

p. 817]; the whole conversation was the items excluded. At no time was discussed the items particularly which were being sold.

I never inquired of any Richfield employee at that meeting concerning the wells or the casing in the wells no more than we ever discussed the character of the tanks or the character of the pumps or the character of the brick. None of that was discussed. [R. p. 818.]

Following that was a meeting in your office [R. p. 818]; yourself, Mr. Davis and Mr. McGahan, I think, and Mr. Ferer and myself were present [R. p. 819]; Mr. Ferer and I read the contract [R. p. 819]; after reading the contract, Mr. Ferer requested certain changes. [R. p. 819.]

We were not discussing scrap metal at that conversation that I remember [R. p. 821]; as I recall it, Mr. Ferer spoke to Mr. Davis in this chair over here and said, 'Mr. Davis, this contract includes everything on that property, so, to clarify that, can we not have this paragraph changed and the words "all metal and lumber" added to it to clarify the whole issue?' And I think Mr. Davis turned around to you and said, 'Well, I don't see any objection,' and I think you agreed with him. I think that is the way the thing occurred. [R. pp. 821, 822.] We merely said metal would include everything there on the property [R. p. 822]; two-thirds of the pipe lines which we were buying were buried underground [R. p. 823]; they were not exposed; some of them were exposed. [R. p. 823.] There was no conversation held by me and I don't believe by Mr. Ferer outlining the all-inclusive items which would be included under the words 'metal or lumber.' There was no mention whatsoever of either the casing in the wells

or the wells themselves [R. p. 828]; nor the tanks nor the valves nor the fittings [R. p. 829]; Mr. Ferer said, as I recall, 'In this warehouse there are nipples and valves and fittings in the warehouse stock. They are not included in the contract. There are lots of items like that. And, if we don't have this all-inclusive paragraph, you haven't got a definite contract.' [R. p. 830.]

I am a graduate of the University of California in petroleum technology and I have specialized in it. We think of casing in terms of the purpose for which we are going to apply it after we get it. [R. p. 831.]

Neither Mr. Davis nor Mr. McGahan or any other official or employee of Richfield Oil Corporation ever told me prior to the execution of the contract that Richfield Oil Corporation did not intend to sell the pipe in the oil wells on the property [R. p. 832]; prior to my taking Mr. Ferer to the property and prior to the execution of the contract neither Mr. Davis nor Mr. McGahan or any other official or employee of the Richfield Oil Corporation ever told me that they intended to sell only such producing and refining equipment as was upon the surface of the property up there; I did not have any knowledge from any source whatsoever and I did not suspect that it was the intention of the Richfield Oil Corporation in signing this contract not to include in the conveyance to Aaron Ferer & Sons the pipe in the wells on the property [R. p. 833]; the only contract that I have any knowledge of between Richfield Oil Corporation and Aaron Ferer & Sons relating to the sale by Richfield Oil Corporation and the purchase by Aaron Ferer & Sons of producing and refinery equipment and facilities on the Casmalia property is the contract expressed in the written contract dated

January 17, 1941 [R. p. 834]; Mr. Morris Ferer prepared a check, which I believe was a cashier's check, and, as I recall, I was with him when we came up and gave it to Mr. Harold Davis. [R. p. 839.] The occasion when that telephone call was made from Mr. Davis' office was the day when I came up with Mr. Ferer and Mr. Ferer gave the check to Richfield Oil Corporation [R. p. 839]; Mr. Davis then said, 'Well, we will note down our understanding of what is to go for this consideration,' and I believe that he turned around to the typewriter and at that time knocked off a memorandum and gave it to Mr. Ferer, outlining what was to be included in the contract which Mr. Paradise was to draw. [R. p. 840.]

(The witness was shown a paper which purported to be a typed memorandum bearing the heading, "Sale of Material and Equipment at Casmalia," and appearing to have the initials in the lower left-hand corner of the dictator, "H. P. D.," bearing the date January 8, 1941, in the lower left-hand corner.)

That is the memorandum which Mr. Davis prepared. It is marked as Plaintiff's Exhibit 1 for identification. This meeting in Mr. Paradise's office was around January 14th or 15th. At the time that Mr. Davis handed this paper to me, I noticed in it this clause, 'Everything will be sold to the above with the exception of the following:' [R. p. 840.]

At that time it was my understanding that the deal between Aaron Ferer & Sons and Richfield Oil Corporation was that Aaron Ferer & Sons were buying everything on the property by way of production or refinery equipment or facilities except the items specifically excluded on this memorandum."

Deposition of Morris Ferer.

Direct examination by Mr. Paradise:

Mr. Ferer's testimony is substantially the same as that of Mr. Clements with respect to the incidents which both covered. Mr. Ferer:

> "Aaron Ferer & Sons is a co-partnership engaged in scrap metal business, usable machinery and equipment, etc. I have charge of the business and determine its business problems [R. p. 845]; I was unable to obtain sufficient information from Richfield to calculate the job; one time I spoke to Mr. McGahan and asked him if there was any information or inventory regarding that job and he said no; that they didn't have an inventory that was up to date and that it was up to us to go out there and check it ourselves; he didn't refuse, he may have said there was no current inventory [R. pp. 848, 849]; I didn't ask him about tonnage; I felt he wasn't familiar with it or didn't know about it. I didn't ask any other employee of Richfield about it. [R. p. 851.]
>
> I first learned that Richfield proposed to sell certain equipment and facilities at Casmalia in late November or early December, from Mr. Clements [R. p. 852]; we went to the property and inspected it; saw Mr. Duncan there; got a map of the property from Duncan [R. pp. 854-857]; spent possibly a half hour with Duncan; Ferer and Clements stayed 'the whole day.'"

Ferer said:

> "I couldn't see the pipelines because 'it was underneath the ground' [R. p. 858]; 'some were exposed' but the 'major part was underground'; 'I have been in this business 25 years or more'; I have figured

lots of jobs but never one like this; because in other jobs the machinery or other things are in front of you and you can at least get an idea in estimating [R. pp. 860-861]; I took it for granted Mr. Clements knew his business—it was completely unknown to me. He told me the wells should produce a minimum of 50,000 feet, possibly 100,000 [R. p. 863]; I never had any conversations with any Richfield employee except this one with Mr. McGahan and a short one with Duncan; the one with McGahan was prior to January 8th, 1941; neither the wells or casings were mentioned by McGahan [R. p. 866]; I took Mr. Clement's figures in estimating the pipe to be taken from the wells. He stated that there were some state laws to be complied with in abandoning oil wells. [R. p. 869.] He did not inform me in detail about the recoverable casing or about rigging up or cost of abandonment of oil wells or how the abandoning would be done. [R. pp. 870-871.]

In figuring tonnage we lumped it all together. Our estimate was somewhere from 3,000 to 6,000 tons—including everything on the property, producing equipment and refinery, etc. [R. p. 872]; there was a negligible amount of loose metal lying around. It was rusty and twisted. It can be sold as scrap [R. p. 873]; I made no estimate of costs; hoped it would be low. I made a mental allowance for cost of clean-up, etc.; don't remember what was figured for cost of abandonment; am hazy about what Mr. Clements told me; left the matter to him on account of my inexperience. [R. pp. 875-878.]

We figured on everything on the property and expected to get everything with the exception of 'the items that were to be excluded.' [R. p. 881.] As we figured the largest portion of the material was

hidden tonnage. I realized the map would give us as much information as we could possibly get. [R. pp. 884, 885.]

The next conversation I had in connection with the transaction was with Davis. I brought him this cashier's check for $22,000.00—present Mr. Davis, Mr. Clements and myself. We talked about those exceptions and then he called you and you were tied up. We made a later date that we should come up and sign the contract or go over it. He told us we bought everything on there, with the exceptions. Mr. Davis handed us a second sheet of sale. We didn't discuss items of equipment or anything. The memorandum was practically self-explanatory [R. p. 588]; there was nothing to mention. We bought everything and expected to get everything except the items that were excepted. There was no conversation because we understood our offer covered everything and his memorandum covered everything and the items that were to be excepted. We had already made the deal and had given them our money and there wasn't anything to discuss that I remember [R. p. 889]; there was nothing said other than that they wanted to maintain a water line for the superintendent's house and for the cattle that they were going to have on there and a gas line so that the superintendent would have gas; that we couldn't disturb the gas line [R. p. 891]; I don't remember whether that was in the conversation down there or whether it was up here at the time when we were discussing the things that were excepted. That was actually the whole gist of our conversation in all of these conferences, was things that we couldn't take. [R. p. 891.] I requested the addition of the words, 'all metal and lumber.' [R. p. 893.] You talked about having a gas line to the superintendent's house and you were

going to keep that house and you wanted a water line there; I think it is reasonable to assume that you wouldn't want us to go in there and tear up that gas line and wreck the man's mode of living. I didn't know that the gas came from the wells. [R. p. 894.] I didn't give any thought at all to this provision in the contract, which excludes gas pipe lines connecting wells with the superintendent's home as calling attention to the fact that the gas lines were connecting the wells on the property—where the gas came from never occurred to me. [R. p. 895.]

There was no mention of any wells. [R. p. 897.] I did not see gas seeping from the caps on the wells. I just said that I smelled gas. [R. p. 898.]

At no time did I make inquiry as to the abandonment of any wells; as to our right to abandon them, I didn't examine the map prior to the signing of the contract; I didn't make a minute examination of the map. In the conversation in your office we were discussing mainly the items that were to be excepted. [R. p. 900.] Those present were Mr. Davis, Mr. Clements, yourself and possibly McGahan. There was something in the contract or draft that you handed me that I didn't quite understand and I said, 'Well, as long as we are getting everything and we have bought everything with the exception of the items that you are excluding—' if you will remember, I said, 'I haven't any lawyer up here. If you will just put in there "all metal and all wood," that will cover everything except the items that you are excepting and I see nothing wrong with the contract.' [R. p. 901.] There was discussion about putting up fences and filling the ditches for all these cattle you were going to have there and also there was a discussion of certain lines that were to be cut off at the

tanks that you were to retain. [R. p. 903.] I don't remember whether at the conclusion of that conversation we were to have those metal supports and steel walkways and overhead lines. I would take it for granted that they would go because they were not excepted and everything that was on the property was to go. [R. p. 903.] It isn't true that I raised the point about the supports and the steel walkways and the overhead lines when I requested the addition of 'metal and lumber.' [R. p. 905.] My request for all metal and all lumber was to take in everything that was on that property. That was definitely my reason. [R. p. 906.] When I asked you to put the phrase 'all metal and lumber' in there, I had reference to everything, including the pipe, the pipe line in the wells and the pipe line and all the lumber and everything that was on the property. [R. p. 907.] No Richfield representative at that meeting mentioned the casing in the wells or the abandonment of any of the wells. [R. p. 908.] Mr. Clements did not tell me what quantity there was in pipe lines. He couldn't guess any more than anyone else because it was hidden. [R. p. 909.] We commenced work under the contract a week or ten days after the contract was signed. Our first steps to abandon any of the wells on the property was some time in June or the latter part of May, 1941. Clements handled that. I think that is when the question came up that you were objecting to the oil wells being taken up or something. [R. 911.] The reason we didn't begin before was that it rained. [R. p. 912.] By our offer we intended to buy everything on that property, including all the equipment, wells and everything, except the items that they had sold or were retaining; I did not intend to buy only such equipment as was on the surface of the land.

Prior to the time I made that offer, neither Mr. McGahan or any other official or employee of Richfield Oil Corporation told me that Richfield was interested in selling only producing and refining equipment and facilities which were on top of the surface of the land. And at the time I executed the contract in writing on January 17, 1941, my belief and intention was the same. [R. pp. 915, 916.] No one connected with Richfield ever told me that casing in the oil wells was not to be included in the sale."

Mr. Ferer is shown what purports to be a carbon copy of a letter, dated December 10, 1940, addressed to Richfield Oil Corporation, and indicating that the letter was sent by Aaron Ferer & Sons:

"The Witness: It is a true and correct carbon copy of a letter written by Aaron Ferer & Sons to Richfield Oil Corporation. Mr. Krasne reads the first paragraph of the letter which was Plaintiff's Exhibit No. 2.

At the time I wrote this letter I intended the word 'pipe' to include the pipe in the oil wells on the property as well as all other pipe on the premises. [R. p. 918.] The next thing that happened after I sent that letter was we received a call from Mr. Davis, a letter stating that they accepted our offer." [R. p. 919.]

(Plaintiff's Exhibits 1, 2 and 3 appearing in the record at this point are printed at pages 215 to 221 and are therefore omitted here.)

"At the time I received this letter, I had no knowledge of any intention on the part of Richfield Oil Corporation that Richfield Oil Corporation did not intend that the pipe in the oil wells was to be included in the same which they were accepting by this letter.

[R. p. 920.] I did not suspect that they did not intend by this document to accept a deal wherein the pipe in the oil wells was to be sold to me. At no time prior to the execution of the contract, dated January 17, 1941, did I have any knowledge of any such intentions on the part of Richfield Oil Corporation, or suspect that Richfield Oil Corporation had any such intentions. After receiving the letter from Richfield dated January 2, 1941, I delivered to Richfield Oil Corporation a cashier's check for $22,000, on January 8th or thereabouts. I understood at that time as to what was intended by Richfield Oil Corporation when it used the words, 'Everything will be sold to the above with the exception of the following.' That it was just what it says, everything, and just what I figured on, all the pipe in the wells and everything on the property excepting the items that they retained or had sold elsewhere. [R. p. 923.] I never had any conversations with any official, employee or representative of Richfield Oil Corporation wherein anything to that effect that the pipe or casing in the oil wells was not to be included in the sale as stated by either of us, prior to the contract. There was not an oral agreement between me and Richfield, wherein it was agreed by the parties that only the producing and refinery equipment and facilities upon the surface of the land were to be embraced in the sale from Richfield to me." [R. p. 925.]

"About such matters as compliance with certain laws and the regulations of the fire warden and the Fish and Game Commission and the matter of the

term of the contract and the matter of how Aaron Ferer & Sons work was to be performed and the matter of insurance coverage and indemnification, etc. Those matters were not discussed but they were put in your contract. They were in the contract you drew up. [R. p. 930.] Pipe line to me means all pipe that is on the property and pipe in the wells. Pipe line to me would mean a string of pipe, whether it was vertical or horizontal or any other way. I am putting that meaning on it now and I have always had that." [R. p. 931.]

There is no vestige of evidence in the deposition testimony of either Clements or Zeidenfeld or Ferer to support the essential averment in defendant's counterclaim that on or about January 17, 1941, plaintiff and "defendant orally agreed" to the sale by defendant to plaintiff facilities and equipment upon the surface of certain premises, which agreement did not include casing or pipe installed in any of the oil wells, etc.

There is not the slightest evidence in the depositions of *any oral agreement whatsoever.*

It will be necessary for defendant's counsel to tell this court what, if any, evidence he claims, supplies such proof. Plaintiff's counsel, seeking to discover any testimony which might plausibly be so construed in order that the insufficiency thereof might be shown, has found none.

It is anticipated that the reply brief will attempt to bypass this issue on the theory that when the written con-

tract was executed, plaintiff suspected that defendant did not intend to sell the casings in the oil wells, and that defendant did not so intend. The findings indicate that this factual hypothesis, conjoined with Section 3399 of the Civil Code, satisfied the trial court of its right to render the judgment herein.

No finding was made that a prior oral agreement, differing from the written contract, was ever entered into.

There are three answers to this argument. 1. It is contrary to the settled law. 2. There is no substantial evidence in support of either of the facts which make up the theoretical premise, and, 3. If any such can be found, it utterly fails to meet the requirement of the law in cases for reformation on the ground of mutual mistake, namely, that the proof of defendant's intent and plaintiff's suspicion be "clear and convincing." Numbers 2 and 3 have been discussed.

The Theory That a Written Contract May be Reformed by Court Decree Because of Party's Suspicions When no Prior Contract Had Been Made Has no Support in Law.

Decisions have been quoted in this brief which show beyond the possibility of plausible contest that without allegation and proof of a prior agreement courts of equity have no power to reform a written contract, for the obvious reason that such action would constitute the drafting of a contract by the court merely based upon negotiations of the parties.

We challenge respondent counsel to produce any decision in California or elsewhere to the contrary. Our careful research has found none.

Section 3399 of the Civil Code does not so provide although it authorizes the reformation of a contract to conform to a prior agreement where it is shown that one party knew or suspected that in executing the contract the other party was making a mistake.

It is so held in the California cases which have considered Section 3399.

The latest of these cases is *Carpenter v. Froloff,* 30 Cal. App. (2d) 400. In upholding the pleadings it is said:

"The pleadings herein allege what the real agreement was, and what the agreement in writing was, and where the writing failed to embody the real agreement." The opinion shows that the evidence supported these averments and also showed "how the mistake was made, whose mistake it was and what brought it about." Other cases of the same type are *Los Angeles Co. v. New Liverpool Co.,* 150 Cal. 21; *Cleghorn v. Zumwalt,* 83 Cal. 155; *Bank of America v. Granger,* 115 Cal. App. 210; *Starr v. Davis,* 105 Cal. App. 632; *Burton v. Curtis,* 91 Cal. App. 11.

In each of the above cases (except *Auerbach v. Healy*), an agreement, oral or written had been made, and a subsequent contract or instrument to effectuate the original agreement contained some material alteration and the later instruments were reformed.

These decisions do not pretend to say that reformation could be decreed in the absence of an agreement whose stipulations could be given effect by reformation.

In *Auerbach v. Healy,* 174 Cal. 60, the Supreme Court states:

> "In this state mutuality is not always necessary. It is sufficient if there was 'a mistake of one party, which the other at the time knew or suspected.' (Civ. Code, Sec. 3399.)
>
> "Nevertheless the Court declared: The rules of pleading in actions for reformation of contracts are well established, and should be familiar. The complaint should allege ('what the real agreement was, what the agreement as reduced to writing was, and where the writing fails to embody the real agreement.' (34 Cyc. 972.))"

No substantial defense against the motion for summary judgment having been presented the denial of the motion was clearly prejudicial error.

Therefore, if authority is needed for so plain a proposition as that without proof of a prior agreement reformation of a contract will not be decreed to re-write a written agreement to make it conform to the suspected intent one of the parties to mere negotiations, we have it in the *Auerbach* and the *Carpenter* decisions, both of which have so held in spite of the fact that in each case Section 3399 of the Civil Code, and its "Knew or suspected" provision was taken into consideration and evaluated.

II.

The Court Erred in Ordering the Dismissal of the First Cause of Action Set Forth in Plaintiff's Amended Complaint.

The sufficiency of Count I to state grounds for declaratory relief was challenged by the motion to dismiss.

The order of dismissal was filed on January 12, 1942. [R. p. 41.] It shows on its face that it is predicated on the court's memorandum of conclusions, dated December 29, 1941.

The order reads:

> "For the reasons set forth in the Memorandum of Conclusions this day filed, it is ordered that defendant's motion to dismiss the amended complaint be denied, also that defendant's motion to dismiss the first count of said amended complaint be sustained without leave to amend, and that defendant serve and file its answer to the second count of the amended complaint on or before January 12, 1942."

Count I is the declaratory relief count. Thus by said order the parties were informed that the reason for dismissing Count I was within the language of the memorandum of opinion in which the court construed the written contract and held that by its terms the defendant sold and conveyed to plaintiff the casings in the oil wells which is the subject matter of this suit. It therefore is plain that Count I was dismissed because the court concluded that no substantial controversy between the parties existed which necessarily construes the memorandum opinion as having decided the written agreement was so plain and unambiguous that the meaning of its term were not open to dispute. Appellant will contend that this is

not sufficient ground to dismiss an action for declaratory relief, yet no other possible reason appears in the memorandum.

Count I contained all of the elements of a proper case for declaratory relief under the present Federal Rules of Procedure which provide for the determination of questions both of law and equity where there is an "actual controversy."

It is clear that Judge Holzer misconstrued the law, section 400, Title 28, U. S. C. (Jud. Code Sec. 274d).

It is implicit in his decision that he thought that the term "actual controversy" as it is employed therein means "substantial controversy," that is, a controversy based on substantial grounds.

Said Section reads:

> "Declaratory judgments authorize procedure. 1. In cases of actual controversy the courts of the United States shall have power upon petition, . . . to declare the rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief be prayed and such declaration shall have the force and effect of a final judgment or decree and be receivable as such."

Ohlinger says with reference to whether an "actual controversy" is presented in a given case, three test questions are presented:

They are:

1. Whether the parties intend or desire to act on the rights to be declared;
2. Whether "present" or "future" rights are involved;
3. Whether the parties are friendly.

An affirmative answer to the first test is requisite. Negative replies must be provided to the second and third. [Vol. 3, Ohlinger's Fed. Pr. p. 751, *et seq.*] With reference to the meaning of the term "actual controversy," the Ohlinger text relies upon decisions which hold that the matter must not be moot and a legal question must be presented whether formed upon matters of facts or of law. There can be no doubt that the instant Count I qualifies as to this definition. It shows that the parties made conflicting claims to the oil casings in certain oil wells, based on a written contract. It is not material that the answer to the question thus presented is obvious. It is said in*Maryland Cas. Co. v. Hubbard*, 22 F. Supp. 697, 702, "The existence of a cause of action is not essential to a declaration. It may seek only adjudication of freedom from a claim (citing cases) and it is said the purpose of declaratory relief is to "set controversies at rest," (citing Federal cases and other authorities).

Hence, it necessarily follows that the interpretation which Judge Holzer had given to the written contract was no valid reason for dismissing Count I, because the averments set forth therein showed that, however ill founded, the defendant claimed that the oil casings were not included in the sale and conveyance which the written contract, on its face, included. [Amended complaint paragraph VI, VII, VIII, R. pp. 21-23.]

Test 2. Paragraphs IX and X [R. pp. 23, 24] show that the controversy is so definitely *in presenti* that the de-

fendant is interfering with the carrying out of the contract by the plaintiff.

Test 3. The whole count negatives the idea that the suit is friendly. This fact is too clear to require elaboration.

It may be properly added that the finding in the "Memorandum of Conclusions" pertaining to damages claimed by the plaintiff could not warrant the conclusion that plaintiff is not entitled to declaratory or equitable relief.

As to plaintiff's claim for damages—the Maryland Casualty Company case and others cited in its opinion hold that the present Federal Rule 57 includes legal rights, legal relations and legal remedies. To the same effect see Volume 3, Ohlinger's Federal Practice, page 776. Also on pages 779 Ohlinger points out that by Rule 57 "The right to trial by jury is saved." It is too plain to require authority that a defendant cannot defeat the plaintiff's right to relief by a counterclaim seeking damages.

Since Count I states facts which entitle plaintiff to maintain its suit for declaratory relief Judge Holzer's order dismissing it was error.

Aetna Life Ins. Co., v. Haworth, 300 U. S. 277, 81 L. Ed. 617;

United States Fidelity etc. Co., v. Pierson, 97 F. (2d) 560.

III.

All of the Essential Findings of Fact Are Contrary to the Evidence. They Are Unsupported by Any Substantial Evidence.

Before proceeding with a detailed discussion of the findings it is important to recall that in denying defendant's motion to dismiss Judge Holzer had determined that the written contract is clear and unambiguous in its language and that by its terms it conveys to plaintiff the casings in all of the oil wells involved in this suit. These findings have not been seriously questioned and the attempt to reform the contract presupposes the soundness of Judge Holzer's original decision. The findings themselves are drawn on that theory, although by Finding 30 the judge expressly refrained from again committing himself on that issue. [R. p. 154.] But for the purposes of the questions now being argued the import of the written contract has been clarified and stands out as the target to be torn down by such extrinsic evidence as defendant was able to produce.

The presentation of this ground for reversal and assignment of error will follow the pattern of the findings in respect to their substance and effect; that is to say, the findings group themselves into two principal classes.

In group 1 are findings of ultimate facts.

Group 2 are findings upon evidentiary facts from which it is apparent that the court based its findings of ultimate facts.

Appellant proposed to prove from the record that each of the evidentiary findings is either unsubstantial as evi-

dence of any ultimate fact found, or is unsupported by any evidence. It is obvious that such proof must invalidate the findings of the ultimate facts and render them insufficient to sustain the conclusions of law or the judgment.

The Findings by Groups.

Group 1. In this group are a part of finding 3 and findings 4 and 5. They purport to find that the written agreement does not express the intention of the parties at the time said agreement was executed, and that the parties intended to exclude casings in oil wells from the sale, which exclusion is not contained in said agreement.

A part of findings 8 and 23 are to the same effect as to defendant's intentions *during the period of negotiations.*

By finding No. 10 the court concludes that plaintiff knew or suspected that defendant did not so intend when the contract was executed. Finding 24 is to the same effect as No. 10, as to the plaintiff's knowledge and suspicion *during the negotiations.* By finding 28 the court concludes that the failure of the written contract to express the true intentions of the parties was due to a *mutual mistake.*

By finding No. 25 the court finds that it was *defendant's mistake* which caused the failure of the written contract to represent the true intentions of the parties. By finding 29 two particular items are named as being the provisions of the written contract which fail to express the intention of the parties, the primary one being the provision which includes within the sale casings in the oil wells.

It is important and noteworthy that by none of these findings did the court find that the parties ever entered

into an oral contract prior to the execution of the written contract.

All other findings (except 1, 2, 6 and the last paragraph of 7 and 31, which are not challenged) are evidentiary findings in support of said findings of ultimate facts. These are numbers 7 (except the last paragraph), a part of 8, and numbers 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22.

EACH OF THE EVIDENTIARY FINDINGS IS EITHER UNSUBSTANTIAL AND INSUFFICIENT TO SUPPORT ANY ULTIMATE FACT OR HAS NO SUPPORT IN THE RECORD.

A part of finding 8, and finding 9, each consists of statements of fact found by the court which were apparently regarded by it as tending to show that the defendant did not intend to include in the sale any of the casings in the oil well. These facts will be discussed in the order which they occupy in the said findings. They read:

> 1. "During said negotiations and at the time of the execution of said contract, all of said employees of defendant knew that none of the oil wells upon defendant's Casmalia property was to be abandoned. Such employees had been instructed that 'surface equipment' on said premises was to be sold. Neither defendant nor any of said employees intended to sell to plaintiff any of the oil well casing in any of the wells. Neither defendant nor any of said employees of defendant intended that any of the oil wells be abandoned or that any casing be removed from any of such wells. Casing cannot safely be removed from an oil well without complying with the requirements of the California Division of Oil and Gas regulating the abandonment of oil wells."

There is some testimony in support of this finding. It all came from the defendant's employees. The ease with which such evidence can be produced and the obvious impossibility of contradicting it, necessarily renders such evidence standing alone, considerably less than the clear and convincing evidence required to invalidate a written contract or any provision thereof.

In this case it cannot be denied that another consideration reduces the alleged statements of these employees, said to have been made, as they were, within the privacy of their employer's office and among themselves, to a minimum of weakness. These very witnesses were aware that they had grossly neglected their several duties to protect the interests of Richfield by reason of total failure to object to the provisions of the written contract, which provisions, according to their testimony, they had been instructed to exclude. This feature of the evidence will be elucidated later in this discussion, but the brief statement above made suffices to show that no reasonable person could accept their testimony alone, as convincing evidence of the circumstances above set forth, which, even if true, supplies no rational basis for any inference.

As to the intentions of the Richfield Corporation management, undoubtedly situations similar to the one here presented gave birth to the adage, "actions speak louder than words." If it is true that during the period of negotiations said employees of the defendant all knew that the oil wells were not to be abandoned and that defendant intended to sell its surface equipment and that casings could not safely be removed without abandoning the wells according to law, and if from these facts said employees suspected that the casings were to be excluded from the sale, how could said employees have failed to note that the

written agreement, as drafted by Richfield's able attorney failed to exclude the oil well casings after providing that all of the "equipment and facilities located on said land" including, among other things, all "metal" located on said land, was sold to plaintiff; also that defendant thereby required Ferer & Sons to remove "all equipment, facilities and other property located on said land," without excepting any casings in any wells on said land? [R. p. 27.] They all read this instrument and no one mentioned the casings or requested that a provision for their exclusion be added to the writing. This happened in the office of Mr. Paradise on January 17, 1941. [Rep. p. 308.] Mr. McGahan was there; Davis was there; Kelly was present and Mr. Paradise was there. [R. p. 308.] Of course, if any of defendant's employees, Davis, McGahan, Kelly or Montgomery, or Richfield "management" had ever informed Mr. Paradise that the oil wells were not to be abandoned and that no casing in any oil well was to be sold he would have most certainly not failed to protect his client's rights. To reason otherwise would be preposterous. Hence none of these employees or "management" ever said anything to Mr. Paradise concerning these alleged intentions. But before the above illuminating event occurred, at which experienced and efficient employees all conincidentally suffered a total lapse of memory or were stricken blind or dumb, Ferer & Sons had made a formal written offer of $22,000.00 couched in equally all-inclusive language [Plaintiff's Exhibit 2, R. p. 215], and said employees, Davis and Kelly, had read the same, it must be presumed, carefully, and then with equal care had prepared and signed an acceptance thereof, specifying and expressly stating Richfield's understanding that the offer provided that defendant sold to plaintiff *"all* tanks . . . tank car loading facilities and other *material and equip-*

ment belonging to Richfield located on our Soladino lease in Casmalia with the following exceptions," in which no mention of oil casings was inserted. [Plaintiff's Exhibit 3, R. p. 218.]

Truly, the person, whether layman or judge, who would believe that either Davis or Kelly then had knowledge that defendant did not intend to include any oil casings in this deal or that they, individually, intended that such casings should be excluded, would believe in Santa Claus and accept as absolute verity all of the stories related in Alice in Wonderland. The entire conduct of these men in reference to either one of these written documents, definitely and conclusively belies their testimony. It was none other than Davis, whose business it was to conduct the preliminary negotiations of such sales as this one, who prepared Plaintiff's Exhibit 1, dated January 8th, 1941. [R. p. 219.] It purports to be a memorandum of this transaction, which says that "everything will be sold to the above with the exception . . .," followed by a list of exclusions, which list *does not contain any reference to oil wells or casings in oil wells.* At this point in the negotiations a statement by Davis was a statement by Richfield. He was authorized to conduct the preliminary negotiations of these sales. [R. p. 93.] It is unbelievable that this particular employee had ever held the thought that the casings in the oil well were being reserved from this sale or that he ever had been informed by a superior in the Richfield set-up that such was the purpose or intention of "management."

However, Judge Holzer had the exhibits read to him. He presumably perused them during the period while he had the case under advisement. Yet he brushed them aside as of so little consequence that they did not even

raise a substantial or reasonable doubt in his mind as to the truth of the testimony of the deeply interested witnesses who declared that they and Richfield "management" did not intend to sell the casings in the oil wells, and he fully credited their stories, which collectively declared that Montgomery told Davis or Kelly, Kelly told Davis and Davis told McGahan, and all of the Richfield employees knew, that the casings in the oil wells were to be retained for use when the wells should be reopened. Self-serving as the testimony of these employees was; flatly contradicted as it was by every writing to which any one of them affixed his signature; condemned as utterly unbelievable as that testimony had been by the conduct of each employee who partook in or knew about and had the opportunity to protest against the failure to exclude the casings from this sale, the trial judge still found that "Neither the defendant nor any of said employees intended to sell to plaintiff any of the oil well casings in any of said wells," and that "such employees had been instructed that 'surface equipment' on said premises was to be sold."

To say that this finding is based upon the "clear and convincing evidence," which the law requires to warrant reformation of a written instrument, deliberately executed, is not merely unreasonable, it is irrational.

No single circumstance pertaining to this issue is more important as tell-tale proof than the fact that Attorney Paradise *failed to testify* that Davis or Kelly or Montgomery or "management" informed him when he received the date for drafting the written agreement, that the casings in the oil wells must be carefully excluded from the sale. It must be remembered that said casings was the *only item* which Richfield witnesses pointed out as having been mistakenly omitted from the exclusions of the writ-

ten agreement; everything else was meticulously taken care of in the draft which Mr. Paradise prepared; yet the casings represent the one and only important item to Richfield, from the standpoint of value and of utility. A few feet of gas pipe could be replaced at trifling expense; a water pipe, the same; a superintendent's house need not be a mansion; the six storage tanks could be replaced at comparatively small expense. However, the silence of Mr. Paradise as well as the failure of every employee witness concerned to testify that he told the attorney about the alleged fixed policy and purpose of "management" and of said witnesses to keep the casings, and demonstrates that Mr. Paradise never had received the slightest mention of the matter. This being a fact, it logically must be concluded that the testimony on which said finding was based is false and unbelievable because if it had been true the exclusion of the casings would have been uppermost in the minds of Davis, Kelly and Montgomery and they would have not failed to tell Paradise about it.

We invite opposing counsel to show fallacy in this reasoning.

With reference to the finding that all of the defendant's employees knew that none of the wells on the Casmalia property was to be abandoned and that the casings cannot safely be abandoned without complying with regulations of the California Division of Oil and Gas, said facts, even if true and supported by evidence, have no tendency to prove that defendant did not intend, by this transaction, to sell said casing. This proposition has been fully discussed under the preceding caption and need not be repeated here. However, it should be added, that since the written contract conveyed the casings it must be inferred that *defendant intended to comply with the said regula-*

tions, if any action by Richfield was necessary. A contract to sell implies a covenant to deliver. Failure to deliver is a breach of contract.

Surely the facts last mentioned argue against the court's theory and findings and strongly indicate the opposite intent.

On the other hand, how can it be logically inferred that the knowledge by Davis and Kelly and Montgomery, and even McGahan (who had no authority to make a sale), tends to show any intent on the part of the defendant, since all of that brain-burdening knowledge had so little significance to them, and to each of them, that they not only stood by without a verbal utterance of protest, but participated in the preparation of Plaintiff's Exhibit 2 [R. p. 215], and in the acceptance of Plaintiff's Exhibit 3. [R. p. 218.] By these documents the sale of the casings was recognized or made an accomplished fact, even though, defendant claims, this necessarily required the abandonment of the wells. It simply does not make sense to accord to the circumstances set forth in said finding any weight as a factor in making out a clear and convincing case for the reformation of a contract. There is no other evidence which could plausibly be classed as tending to show that the defendant's employees intended anything other than the intent shown by the written contract.

The finding, itself, is meaningless and immaterial to any issue in this case in stating that said employees "had been instructed" that none of the oil wells "were" to be abandoned. Instructed by whom? The finding fails to say by whom. This is vital because we are dealing with the intent of a corporation which can intend only through authorized officers. Instructions from any other officer or employee would thus be irrelevant and every presump-

tion is against any inference which would change the written contract. Again, the testimony of Montgomery shows that neither he, nor Davis, nor Kelly had authority to determine what equipment should be sold. He continually told of making recommendations to "management" and referred to "the management" deciding such matters [R. pp. 468, 470, 471, 473], and nowhere in the testimony of any witness can be found any information as to what person or group of persons constituted "the management." The intentions of these inferior officers are not the intentions of Richfield. The record contains no competent evidence to show that the Richfield Corporation had any intent except as shown by the written agreement, and nothing in finding 8 tends to show a different intent on the part of Richfield. When asked by Mr. Sturzenacker if he called "anybody's attention to the fact that in his mind Richfield was selling the surface producing equipment and not selling all of the producing equipment on the property, Mr. Montgomery said that he could not say to whom he gave any instructions as to what was to be sold, and he said:

> "I had laid down to the man that negotiated the contract or negotiated the sale of this stuff the type of equipment in so far as the production department was concerned and *in so far as I was authorized from my management* as to the type of equipment that was to be sold." (Emphasis added.) [R. p. 480.]

The nearest that Mr. Montgomery ever came to indentifying management was to say that he attended meetings of the "executive committee" [R. p. 467], and made recommendations at "these so-called executive meetings." [R. p. 471.] However, neither by his testimony nor by that of any other witness did the defendant show that

this "so-called executive" group as Montgomery terms it, which may or may not have been "management," ever took any action or officially formed or expressed any intent whatsoever.

Where, then, is there any evidence to the effect that *the defendant* intended to retain the casings in its oil wells? Appellant insists that none exists in the record.

Finding 9. The facts set forth in this finding, on their face, reveal that after operating the wells for about eight years their owner shut off production from them. Fifteen years passed by and the wells were allowed to still remain dormant up to January 7th, 1941, when the written contract was executed. All during these long years, from "time to time" the "problem" of reopening them was "studied"—and that is all. Without more, the conclusion cannot be escaped that the problem left Richfield in doubt; otherwise, why the delay? The field had been drilled; oil had been produced; the fact that production was stopped shows that the wells were not profitable; what was there to study? The mere fact that when derricks, tubing and rods were removed, the casing was not sold, as the court finds, does not show or tend to show that the reason for not selling it was an intention to reopen the field. We need not go beyond matters of common knowledge in California to know that casing in abandoned wells is often removed and used in other fields when needed, and in the meantime is allowed to remain where it is; it might well be that the time to sell second-hand casing was not opportune. The demand may have been slight and prices low. Every presumption in equity is against the view that any circumstance tends to sustain an attack upon a written contract deliberately executed. (*Manning v. Sourissen,* 128 Cal. App. 635; *Moore v. Vandermast,* 19 Cal. (2d) 94.) The interpretation of any fact or circumstance

which favors the correctness of such a contract must be adopted rather than one which would impair it. *(Burt v. Los Angeles etc. Assn.*, 175 Cal. 668; *Moore v. Vandermast* and *Manning v. Sourissen,* both *supra.)* The finding that "defendant was of the opinion and belief that such derricks . . . would not be suitable or desirable for use . . . at such time as defendant reopened the field," etc., is meaningless in the absence of any finding that the defendant *intended to reopen the field,* and the fact that the *court refrained from making this finding compels the inference that there was no evidence upon which such a finding could rest,* and it coincides with the logical inference to be drawn from the other facts above discussed, which is that no such intention ever existed, and that, as a matter of fact nothing more definite had occurred than that someone, probably Montgomery, had toyed with the idea over a period of years of opening the field; also, the language of the finding is evasive as to the "new method" which is mentioned, *but whose existence is not found.*

The only act of the defendant which the court was willing to find had ever been done throughout more than fifteen years is described in the last sentence of finding 9. It is said "sometime in 1940" defendant performed an "operation by running instruments into the wells" and "learned that the casing was sufficient to hold back the formations penetrated by the wells"; in other words, the casings operated upon were not yet so corroded as to be unfit for present service if kept in place. Apparently it was suspected that the operation might reveal bad news to the contrary. However, since the presumption must be against any interpretation favorable to the de-

fendant, this finding cannot be otherwise than that the operation was not performed until the last day of 1940, at which time the negotiations in the instant transaction were about concluded, and could have no effect upon the intentions of defendant's employees, Davis and Kelly, unless they were informed of the results of the operation promptly, *and the court did not so find.* On the whole it seems not too much to say that as against the strong presumption that the defendant intended to convey the casing as the written contract provides, and if necessary to its delivery, to abandon the wells, as expressly required by the written agreement, the facts set forth in finding 9, collectively, are too puny and insufficient to tend to show a contrary intention.

The foregoing evidentiary findings concern the intentions of the defendant, only. In that behalf reference is made to a caption wherein it was pointed out that Kelly's affidavit shows that "management" and not Kelly, determined what property should be sold, and that it was not shown what officer or employee or group of employees constituted "the management" or that "management" ever gave any instructions to Davis, Kelly or Montgomery to exclude casings from the sale, or officially formed or had an intent to that effect. Therefore, there is no competent testimony in the record concerning defendant's intentions other than the written contract and as shown by other exhibits, to-wit: the Davis "memorandum of sale," plaintiff's offer and defendant's acceptance.

Findings Which Concern Plaintiff's Intention and Alleged Suspicion

Under Caption I appellant has discussed the facts found in findings 11, 12, 13, 14, 16, 17 and 21 as they relate to the court's order denying plaintiff's motion for summary judgment. The affidavits and depositions of the witnesses for both sides were reviewed and analyzed and it was shown that according to the affidavit of Mr. Davis, McGahan had no authority to conduct any negotiations for this sale and that Davis had exclusive jurisiction of negotiating the sale. It was pointed out that therefore, neither Ferer, nor Clements was charged with the notice of anything which McGahan may have said. Also, it was shown that the testimony of Clements and Ferer to the effect that their intent was as expressed in the executed contract, and, that said affidavits and depositions contain no substantial evidence tending in any way to belie their testimony but does reveal much in consonance therewith. In so far as the facts set forth in the above group of findings is concerned the testimony of the same deponents which was given by them at the trial adds nothing to the materiality of said facts and sheds no new light upon them to give them greater or different meaning. Therefore, in the interest of brevity, which appellant is compelled to regard, further elucidation of said facts will be omitted.

We proceed to the other findings of evidentiary facts. Finding 15 reads:

> "The expression 'surface equipment' is a term in common use in the oil industry, which term means equipment located upon the surface of the land and includes pipe lines even though a portion thereof ex-

> tends underground. Casing in an oil well is not classified or referred to in the oil industry as 'surface equipment' but is commonly referred to as 'subsurface equipment'."

Finding 15 is not clearly and convincingly supported by the evidence. Its only support is hazy, inconclusive, and indefinite. Two experts testified. Mr. Clements, who, according to finding 18 was qualified as an expert on this question was not asked to express an opinion as to whether the term "casing" is referred to in the oil industry as "surface equipment" or as sub-surface equipment. However, he said that "casing" is considered in the oil fraternity in this locality as a part of production equipment." [R. p. 559.] The defendant's expert, Montgomery, conceded that "surface equipment" and "production equipment" are "rather related" [R. p. 494]; he said "some people would consider it (casing) producing equipment and some would call it subsurface equipment", and that "it is certainly used in the production of the well", etc. [R. p. 492.] Thus it is clear that in classifying equipment in the oil industry casing may be called production equipment and that the term "surface equipment" is so interrelated with "production equipment" that casing may be included in surface equipment. Hence, expert Montgomery's statements preclude the presumption that Messrs. Ferer and Clements were given reason to suspect that casings were to be excluded, based on the testimony of defendant's employees who said that they told these men that the "surface equipment was to be sold", because, the contract and the offer and acceptance and the memorandum of the sale all represented that *all of the production equipment,* except the specified items

was being sold, and Montgomery said "some people would consider casing as producing equipment" and *"It certainly is used in production."*

On the other hand, in view of the plain language of every written instrument which figures in the transaction, all but one of which was drafted by defendant's attorney or other employees, plaintiff had a right to believe that defendant intended to convey the casings, whether they are sub-surface or surface equipment for these instruments purported to sell *all of the* production equipment and *facilities* as well as the surface equipment.

For some reason defense counsel failed to ask his expert to define the term "facilities" as used in the oil industry. Obviously it means something more than "equipment". The context demonstrates that the word "facilities" was employed in this contract to include property used in production other than "equipment." The word "facility" is defined by Webster's New International Dictionary as "a thing which promotes the ease of any action, operation, transaction or course of conduct." Certainly casing in an oil well "promotes the ease of the operation" of producing oil. It promotes the ease of the action, the transaction and the conduct of the production. Indeed, it would be difficult to name any other "thing" which is "used in production" of oil except the casing, which promotes the operation of producing oil as distinguished from production equipment. At any rate, no doubt can be entertained that "all facilities" as here used includes and connotes "casings", which, by any quibbling or technical sophistry, could be excluded from the concept of the word "production equipment." Hence the meaning of the "production equipment" is a moot question in this

case and one which could have given plaintiff no concern or cause for consideration. In any event, the evidence does not support finding 15.

Finding 18 [R. p. 153] provides a fact which is included within the rational applicable to the facts discussed under the preceding caption. The finding refers to Mr. Clements' visit to Casmalia when work was being done under the Anderson contract. Mr. Clements had no reason to consider why or how the defendant caused the Anderson contract to be executed or to be concerned in finding out whether defendant had abandoned the wells at that time or whether the field had been depleted of oil. Mr. Clement's only concern was that the defendant had represented in writing that it had certain property for sale. These matters have been elucidated under the previous caption.

In Number 22 the Court finds that if the parties had intended to include the well casings it would have been obligatory on plaintiff to dismantle and dispose of all of the equipment and facilities and to remove the casing "and for that purpose to abandon all of such wells", and that plaintiff did not understand that it was so required and "never intended to abandon such wells". This is a tricky, deceptive finding. It reads:

> "If the parties to said contract had intended to include the casing in such wells among the equipment and facilities to be sold thereunder, it would have been obligatory on the part of the plaintiff, in connection with its obligation of 'the dismantling, removal and disposition of all equipment and facilities to be purchased' under such contract, to remove the casing from all such wells and for that purpose to abandon all of such wells. The plaintiff never in-

tended to abandon such wells and did not understand or consider that the provisions of said contract required plaintiff to perform such work or dealt with that subject matter." [R. p. 153.]

In one respect finding 22 is in the same class with a similar finding contained in Number 9, which has been discussed. Suppose it is true that if the casing was included in the sale, the wells would necessarily have had to be abandoned—this fact is not inconsistent with the intent of either and both parties to include casings in the sale. Since the contract presupposes abandonment it also implies that the *seller*, if called upon, will take whatever steps are necessary to accomplish such abandonment. To reason otherwise is to assume a non-existent premise and use it as the basis to create an arbitrary and illogical presumption contrary to and *against the written contract* which the court cannot do legally.

The finding in the last sentence of Number 22 is clearly a conclusion drawn from the preceding absurdity. However, this *is a tricky finding.* Its first factual premise is a portion of the written contract which the defendant seeks to reform, to-wit: the provisions for the dismantling, disposition and removal of the property to be sold and purchased. The second factual premise is that plaintiff misunderstood this provision of the contract and did not intend to abandon such wells. As to this second factual premise the court found too much and wiped out whatever possibility it otherwise might have possessed of being the basis for a rational inference to the effect that plaintiff did not intend to buy the casings. This finding

itself provides a reason for the intent ascribed to it which cannot be reconciled with the idea that plaintiff did not believe it was buying the casings.

The finding states: plaintiff ". . . did not understand or consider that the provisions of the contract required plaintiff to perform said work", etc., the work being the dismantling, disposal and removal of the casings. *The court did not say that plaintiff did not intend to remove the casing.* This finding necessarily implies that plaintiff did intend to remove the casings, *but not for the purpose of abandoning all of such wells,* and that plaintiff's said intent was based upon a misunderstanding of the meaning of said provision of the contract with respect to the necessity of abandoning the wells when and as it would remove the casings. If a mere misinterpretation of the contract in respect to one obligation or right could be taken to indicate an intention to disregard another obligation or to waive another right, from defendant's alleged misunderstanding and misinterpretation of the instant contract, which the court expressly finds, it must be inferred that defendant intended to waive its right to exclude the superintendent's house or the gas lines leading to said home.

Finding 22 is also fundamentally erroneous because, *as a matter of law, it is contrary* to the evidence. In stating that under the provisions of the written contract it would have been the duty of the *plaintiff* "to abandon all of such wells" the court holds contrary to the universally settled law. By the first provision of the contract which the court ordered changed defendant sold the casings in all of the wells to plaintiff. As a matter of law this entailed the duty of abandoning the wells upon the owner of

the property—the defendant. It is elementary that one who sells an article contracts to deliver it. (46 *Am. Jur.* p. 376.) Under the applicable law of California and the Rules of the Bureau of Mines the owner of an oil well is the party who must make application for permission to abandon it. It is equally settled law that when any act of a party to a contract is essential to carry out its terms, an agreement for the performance of that act will be implied and deemed within the provision to do the act. (12 *Am. Jur.* p. 766.)

There can be no doubt that in assuming, as finding 22 does, that the intent of the parties with respect to excluding well casings from the sale may be inferred from their intentions as to abandonment of the wells, all predicated on the erroneous premise that it was plaintiff's obligation to abandon the wells, the trial judge again overreached himself, and found too much. This conclusion is logically inescapable, because since the law and the contract requires the *defendant* to abandon the wells, and the uncontradicted testimony of Ferer and Clements shows that they intended to do everything in that behalf which the law and the State Administrative officers might require, the inference is in plaintiff's favor and tends to show that it, at all times, intended that the casings should be included in the sale. Upon the same premise, the same inference must be drawn as to the defendant's intentions, for it also must have known that the law required it, as the owner of the wells, to do its part in bringing about the abandonment of the wells in order to deliver what they were selling.

Otherwise, stated, the court's error as to the law, reverses the direction in which the inference points, so that

it tends to keep the written contract intact rather than to alter it.

As above interpreted finding 22 is supported by the testimony of Mr. Clements. He was definite in testifying that he understood and intended that the well casing should be a part of the sale. However, he maintained that it was not impossible to remove casings from the wells without abandoning them. This immaterial testimony is the sole peg on which this finding as to plaintiff's intent and understanding is hung and which led the court into making said finding which back-fires against the defendant as above shown.

On the other hand the literal statement that the "plaintiff never intended to abandon" such wells and considered that the provisions of said contract did not require it to dismantle, remove and dispose of them is wholly without support in the evidence. The only evidence pertaining to that question is found in the testimony of Mr. Clements and Mr. Ferer. Mr. Clements said that while he and Mr. Ferer were at Casmalia inspecting the property, he said, in his own mind, that he did not see any obligation to abandon any of the wells [R. p. 806]; that it was his intention to abandon only those which it would be profitable to abandon. [R. p. 801.] This was before actual negotiations had begun. The deal was still in the embryo stage. Even at that time, however, Clements showed his full intention by testifying "We were going to live up to all of the obligations both to the State government and all liabilities attendant on the abandonment of that property and so stipulated and so signed it and executed it in that contract." Hence, regardless of his thoughts to himself in the beginning when the contract

was made, Clements intended just what its language expressed. Ferer's testimony discloses that he did not consider the matters at all at first but when asked his intentions concerning the abandonment of the wells as provided in the written contract the records show that when asked by Mr. Paradise what his intentions were as to abandonment of the wells, he answered:

> "Well, we consider ourselves a pretty reliable company, and, if there was any bitter with the sweet, we would have to take it and, if there was anything we had to do, that is what we would have done because that is the way we do business."

Finding 22 is imaginative and irrational and contrary to the evidence.

No 29—An Arbitrary, Unwarranted Finding.

Finding 29 is definitely contrary to a mass of evidence, the principal part of which was supplied by the defendant's own employees. The Court found that "the mistake . . . was not caused by or the result of negligence on the part of the defendant." Negligence more gross has seldom ever been revealed in any case than that proved by the defendant against itself in this case. According to the defendant's witnesses, and as found in these very court findings, defendant's employees were all informed and knew throughout this transaction, that the defendant did not intend to sell the oil well casings. That one thing they all claimed to have known. Those who negotiated the deal and who read plaintiff's written offer and executed the acceptance thereof and who joined in executing the written contract in its final form, all had this knowledge and they also claimed to have known that

Richfield intended to exclude a list of comparatively minor items from the sale. It was McGahan's duty to receive bids; Davis' duty to conduct preliminary negotiations; Kelly's duty to execute the contract. Montgomery gave Davis instructions as to certain items to be excluded.

Richfield's own attorney, Mr. Paradise received information from Davis, as to what the terms of the sale were to be and was asked by Davis to draft the contract.

Mr. Paradise drafted the contract. Prior thereto Davis had drafted and signed a memorandum purporting to show what property Richfield offered to sell, and the items which were not for sale, among which items casing were not mentioned. He received an offer in writing enclosing a $22,000.00 check from plaintiff which specified the property to be purchased, and the excluded items, all of which was in agreement with the memorandum. Thereafter Davis, prepared a written acceptance of the said offer, again enumerating the same excluded items, without naming casings in the oil wells. Therafter, Kelly signed and executed the final draft of the contract as prepared by defendant's attorney in which the property to be sold was described in general, all-inclusive terms which included all of defendant's *production equipment and facilities* on the oil field in question. It enumerated the same list of excluded items which had been named in the preceding writings and additional reservations, but did not exclude the casings. During the trial defendant's attorney stipulated that none of said written instruments contained any provision excluding from the sale the casings in any oil well. [R. p. .....] The court found that the mistake which had been made, by reason of which the written contract should be reformed, consisted "of the

failure of said contract to expressly provide (1) that the subject matter of the sale did not include the casings in any of the oil wells located on said land." [R. p. 154.]. Without more ,negligence, more flagrant and inexcusable than is shown in any reported case that has ever been found by appellant's counsel is revealed.

We challenge opposing counsel to produce an example of greater negligence in any business transaction. If Mr. Paradise was informed by Davis and or Montgomery that the casings were not to be sold it was gross negligence on his part to have failed to place the express provision in the contract which the court finds was omitted by defendant's "mistake." If Paradise was not so informed, by either Davis or Montgomery, they, and each of them, were guilty of gross negligence. Also, Davis and Kelly were negligent, in the highest degree, in leaving that same provision out of the accpetance of plaintiff's offer, and Davis was equally negligent in omitting it from the memorandum upon which plaintiff based its offer. The effect of Judge Holzer's finding is a stain upon the record of courts of equity . It places the court's stamp of approval upon conduct which any prosecutor would convincingly argue proved deliberate fraud, since the principal thing of value in the deal was withheld, after the seller had received $22,000.00 for the property which its employees had repeatedly led the purchaser to believe it would get. What chance would a defendant have in such a prosecution to relieve himself of the fraud by having employees take the stand and swear that they told the purchaser that the property to be sold was "surface equipment?" A jury would be told that it is a common practice among slickers to slyly prepare a defense of alleged oral con-

versations to meet any charge of fraud and that the employees were accomplices in the fraud. Many a man has been convicted of theft by trick and devise or false pretenses on less evidence than is here shown. But "the half has not been told." Defendant's employees must have known that both Clements and Ferer were dealers in junk. They had no reason to believe that either of them were conversant with terms peculiar to the oil industry. Although Clements stated that he had some familiarity with such terms, no evidence shows that Davis or Kelly or Montgomery or even McGahan knew this to be a fact. If by saying to Ferer or Clements that the "surface equipment and facilities" would be sold, defendant's employees meant to convey the information that the casings were not for sale, why did they not say just that, plainly and directly? Had one employee, on a single occasion, used this cover-up expression it might be regarded as a mere inadvertence, but where, as here, each of several employees claims to have used the same term in talking with Ferer or Clements at least once, and none of them ever claimed to have said "The casings are not included", or "the subsurface equipment and facilities are reserved" the strange coincidence permits the inference that it was a part of a scheme and plan to deceive, *because defendant's witnesses asserted that they knew the precise meaning of these terms.* Again this same assortment of employees who each failed consistently, to mention casings in oil wells to Ferer or Clements, as though to do so was taboo by common understanding, sat in a meeting in attorney Paradise's office with Messrs. Ferer and Clements (without counsel), when copies of the attorney's draft of the contract were distributed to everyone present and were read by all. This draft contained

no mention of "surface equipment" or of casing in the oil wells, but did convey everything on the property, except, the items which had been excluded in the previous writings. Not one Richfield employee called attention to the supposed fact that his employer intended to exclude the casings from the sale; no one said "we are only selling the surface equipment and facilities." Davis, Kelly and McGahan read, but sat in silence. *Assuming that these men knew* that the sale was intended by their employer to be of surface equipment only with casings excluded, surely they were grossly negligent in failing to protect its interest.

On the other hand, if said employees knew that Richfield did not intend to permit plaintiff to remove the casing was not their conduct fraudulent as to Ferer & Sons, and Clements?

Appellant contends that finding 29 has no support in the evidence and is flatly contrary to the undisputed evidence; that the courts' absolution of the defendant of all taint of negligence is a gross miscarriage of justice, and likewise a judicial admission of ignorance of the principle of estoppel.

Finding 30 is a maverick. It does not belong to either group 1 or group 2, nor is it unchallenged. It was the theory of plaintiff's case throughout that the written contract was plain and unambiguous and that it expressly provided that casings in all oil wells on defendant's property were to be sold to plaintiff with the result that it was not open to attack collaterally or by extrinsic evidence. By its motion to dismiss the defendant contended that the contract clearly excluded the casings from the sale, and thereafter attempted to avoid the issue by plead

ing mutual mistake. But since the court insisted on considering all of the evidence for the purpose of deciding the issues tendered by the amended complaint as well as those tendered by defendant's cross-complaint. the interpretation of the contract, as plain and clear or as uncertain and ambiguous remained a vital issue. If the written contract was clear, certain and unambiguous, it was free from attack except by proof that the parties had entered into a prior verbal contract, which differed from the written contract as alleged in defendant's counter-claim or cross-complaint and in respect to the matters therein specified, yet no such oral agreement was proved or found by the court and by finding 30 the court declined to make a finding on this proposition.

We have concluded the analysis of the evidentiary findings. The others are dependent upon them. It has been shown that none of the evidentiary facts which concern the intent of the defendant corporation have any rational connection with that intent. The findings of the vital ultimate fact that defendant intended to exclude all casings in the oil wells from the sale, are, a part of finding 8 and the last sentence in Finding Number 23. A second group of findings of ultimate facts are also left without support. This group finds that during the period of negotiation and when the written contract was executed plaintiff did not intend that the sale should include said casings. They are parts of findings 5 and findings 23 and 26.

Number 4 and a part of findings 3 and 5 are to the same effect as to the intentions of both parties. Findings 10 and 25 conclude that plaintiff and plaintiff's employees knew and suspected that defendant did not intend to sell the casings, etc. Number 25 also finds that the failure

of the written contract to express truly the intentions of the parties resulted *from defendant's* mistake and number 28 attributes said failure to a "mutual mistake" of both parties.

Finding 5 and 29 describes the mistake or mistakes as failure to exclude the casing in the sale and to relieve plaintiff from the obligation of abandoning the wells and removing or disposing of the casings.

It has been shown that said findings of ultimate facts are each and all are either contrary to the evidentiary finding or unsupported by any of them, because such evidentiary findings have no rational tendency to support said ultimate facts or actually create a contrary inference.

IV.

The Findings Are Insufficient to Support the Conclusions of Law or the Judgment.

The outstanding defect in the findings as failing to support the conclusions of law and the judgment is the absence of any finding that the parties to the Written Contract ever entered into a prior and different contract, oral or written.

It has been shown by citation of California decisions that even where a case is based on Section 3399 of the Civil Code, a prior agreement must be proved to entitle one of the parties to the remedy of reformation, because the essence of that relief and its sole objective is to make the contract which has been mistakingly drafted and executed conform to the genuine agreement on which the minds have met.

V.

The Conclusions of Law Do Not Sustain the Judgment.

The conclusions of law are insufficient to support the judgment because they adhere to the same fallacy which has been pointed out in presenting Point IV. No conclusion of law refers to a prior agreement. It is nowhere concluded that the changes directed to be made are for the purpose of conformity with a prior agreement, and there is no indication that any conclusion is based upon any finding of fact that a prior agreement had been made by the parties.

This fact is a final and conclusive answer to any possible contention that somewhere, lurking in the elusive and indirect language which is employed in many of the findings, is an implied finding of a prior mental concord between the parties.

However, the conclusions entirely ignore the essential element of a prior and different agreement.

The conclusions of law also omit the ingredient of lack of laches or negligence upon the part of the defendant in making the mistake which the findings charge the plaintiff with having suspected. It seems probable that the effort expended in absolving defendant's employees of negligence in the findings would not permit a repetition of that mental feat in the conclusions of law.

CONCLUSION.

The nature of the case and of the assignments of error have militated against brevity. From an endeavor to attain it, however, certain matters have not received the attention which they deserve. Of these, only one will be here discussed. When a party seeks reformation on the ground of mistake it is well settled that he must show how the mistake was made and what cause it. Otherwise the court has no means of knowing or finding that the cause was not such party's gross negligence. In the instant case the defendant made no attempt to comply with this requirement. On cross-examination some facts were revealed. It will be remembered that plaintiff's offer [Plaintiff's Exhibit No. 2; R. p. 215] with $22,000.00 check enclosed covered everything on the property described, excluding certain items, but not the casings. Upon its receipt, defendant's memorandum of "Sale of Material and Equipment" specifies, "Everything will be sold to the above with the exception of the following:". Casings are not excepted. Mr. Davis, whose duty it was to negotiate such sales, drafted this memorandum [R. p. 323]. Kelly, who executed the written contract for Richfield, read the offer, saw the check, and approved the sale memorandum. He so testified on cross-examination [R. pp. 322, 323]. However, he gave no explanation of his apparent gross neglect in approving a transaction and these two instruments each of which clearly evidences the sale of the oil well casings to plaintiff.

Mr. Davis admitted that he dictated Exhibit 1 after receiving the offer [Plaintiff's Exhibit 2], and the check. He identified said exhibits, and Plaintiff's Exhibit 3 (the acceptance of said offer) [R. pp. 213-223]; he said that

Kelly wrote the letter of acceptance but Davis saw it, and immediately before it was written Davis had telephoned to Ferer and stated that the offer had been accepted [R. pp. 225, 226]. Said letter covers all material and equipment belonging to Richfield on said property, without excluding the casings. Without explanation, it is certain that Davis was thus four times grossly negligent, and he never explained what caused him to write and sign the acceptance, which purported to convey away Richfield's casings, contrary to the known intentions of Richfield. It is unnecessary to go on with the other documents and the meeting in the office of attorney Paradise, his preparation of the written contract, and the responsibility of Davis, Kelly and Montgomery for its provisions which clearly sold the oil well casings to Ferer & Sons.

The plain truth as shown by the record, which defendant does not deny, but relies on as a mistake, is that throughout the whole final negotiations and the actual sale defendants employees Kelly, Davis, Montgomery, Paradise, and even McGahan were repeatedly and consistently guilty of the grossest kind of negligence, if their statements and actions were mistakes, as defendant asserts and the court finds, and nowhere and at no time did any one of them, in their several affidavits and testimony, offer a word of explanation or supply the court with any information as to the cause of said monumental mistake which was a composite of at least twenty-five mistakes made by these employees. Hence there is no evidence in the record to support finding number 29 which absolves the defendant of negligence and asserts that "the mistake * * * was not caused by or the result of negligence on the part of defendant."

This finding was plucked out of thin air by the court. It was a pure assumption or presumption against the integrity of the written contract, without which the judgment could not have been rendered for the defendants.

Upon all of the grounds and for all of the reasons set forth heretofore in this brief appellant asks that the judgment herein be reversed.

Respectfully submitted,

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SUPPLEMENT.

The following is a summary of the testimony given at the trial upon which, together with exhibits, the findings, conclusions of law and judgment were based:

HAROLD E. DAVIS.

Cross-examination

By Mr. Sturzenacker:

On, or about the month of August, 1940, I notified Mr. McGahan, the storehouse supervisor of Richfield Oil Corporation, that the management had decided to sell certain of the surface equipment at Casmalia and requested Mr. McGahan to notify prospective bidders that such surface equipment, with certain exceptions, would be made available for sale." [R. pp. 196-197.]

My title with the Richfield Oil Corporation is buyer in the purchasing department; Mr. H. H. Kelly is in charge of that department; as part of my duties I have something to do with the sale or the preliminary negotiations for the sale of salvage and worn out equipment. I am familiar with this equipment that is in issue here at Casmalia. I was first on the ground in September, 1940. Since 1927 I have been with Richfield. During that time either Richfield or their predecessors has owned the property as Casmalia [R. p. 200]; Richfield did acquire it sometime around 1928. [R. p. 201.]

Mr. Paradise: It was stipulated that the wells had not been operated since October, 1925, anyway, prior to the time Richfield acquired it.

Mr. Paradise: The Richfield Oil Corporation acquired Pan American's properties in March of 1937 in connection

with the reorganization under 77B of the Bankruptcy Act of Richfield Oil Company of California which were proceedings in this District. [R. p. 202.]

The Witness: Selling the equipment on the Casmalia lease has been discussed over quite a number of years. I received instructions to conduct negotiations for the sale of salvage from Mr. Kelly. I recall that, sometime in August, 1940, I was notified by Mr. McGahan, the storehouse supervisor of Richfield Oil Corporation, that the management had decided to sell certain salvage equipment at Casmalia. [R. p. 203.] Prior to that time I believe we had disposed of some of that a year or so—I conducted the preliminary negotiations for selling it. Negotiations were finally completed by Mr. Kelly. I negotiated with somebody who was a prospective purchaser, a fellow by the name of Anderson, of Santa Maria. [R. p. 204.] Mr. Anderson finally bought some of the equipment there. He purchased some of the tubing, sucker rods and pumps and some other obsolete equipment which we had in the wells and on top of the ground. That was equipment from the producing unit. He didn't purchase any refining equipment to my knowledge. That is just the tubing. That was prior to the time I made a trip up there. I was fairly familiar with what was there through correspondence that we had and inventories that were available. [R. p. 205.] I would say that the Anderson deal started sometime in the early part of 1940. At that time our inventory disclosed that there were tubings and sucker rods in the various wells.

The Court: Do I understand your testimony to be that the transaction with this man Anderson of Santa Maria included selling to him all the sucker rods and tubing

which could be recovered, together with such surface equipment, and that all the derricks were to be dismantled and burned? [R. p. 206.]

A. That is right; yes, sir. May I add the surface equipment in the immediate vicinity of the wells?

Also the walking beam or the engines or anything else that might have been used in the producing of oil from those particular wells; whatever happened to be right there that was no longer of any value to us.

I buy tubing and sucker rods quite often for our company. So far as I know, however, there was nothing about the tubing or the sucker rods that made them obsolete except that if they were good, we would be using them somewhere else. [R. p. 207.] When he started to work on those wells I would say it was sometime in the spring of 1940 that he started and that he finished sometime in the summer or late summer. [R. p. 208.] We have at the office an inventory of the equipment that we sold to Mr. Anderson and the price.

Mr. Anderson did all of the work on the property that he was supposed to do under the contract to my knowledge. [R. p. 200.] I was up there in September of 1940. I didn't see any derricks still up. The portion of the property which I went over was around the refinery and the tanks that were to be retained and the dehydrator plant and where the superintendent's house is and a few of the wells in that particular area. Wells that were close to those particular units I have mentioned. We didn't go up to the ravine where the wells are in the upper end of the property. I believe the first time I had seen Mr. Clements was when he came in my office with Mr. Ferer

in the early part of 1941. [R. p. 210.] I don't think I had ever met him before. It is possible I had dealings with him between 1938 and the time he came in the office with Mr. Ferer. I remember having some refinery equipment that we sold about that time or prior to the Ferer deal to somebody at Santa Fe, to somebody but it wasn't Clements as I remember. It seems to me like it was a person by the name of Colin. [R. p. 211.] I did not hear Mr. Clement's name mentioned in connection with Mr. Colin, but it is possible that he could have been involved in that deal. [R. p. 212.] It may have been probably in the fall of 1940. The Casmalia deal was generally discussed but I can't recall what we talked about or what our discussions covered. I recall talking to Mr. Clements in my office with Mr. Ferer on the 8th day of January. That was the time that Mr. Ferer paid the $22,000 for the property. Prior to the time that Mr. Clements and Mr. Ferer came to my office on the 8th day of January, I was familiar with an offer that Aaron Ferer & Sons had made to purchase the Casmalia equipment.

Mr. Sturzenacker: We would like to offer this offer as an exhibit, Your Honor. [R. p. 213.]

The Court: To avoid confusion, let's preserve the number that it has and it will become Plaintiff's No. 2 in evidence. [R. p. 214.] Plaintiff's Exhibit No. 2 is a letter dated December 10, 1940, addressed to the defendant "Attention: H. E. Davis, Purchasing Department," signed Aaron Ferer & Sons, by Morris Ferer, bring an offer of $22,000 for certain material on the defendant's Casmalia property. [R. pp. 215-216.]

I am familiar with a letter, dated December 10, 1940, on the letterhead of Aaron Ferer, addressed to Richfield

Oil Company. It is the letter that has been introduced in evidence and has been marked. I am familiar with another letter, on the letterhead of Richfield Oil Company, signed by Mr. Kelly, that has heretofore been offered by the plaintiff as Exhibit No. 3 for identification dated January 2, 1941.

Mr. Sturzenacker: We will offer this, may it please the court, in evidence, to bear the same number that it bore for identification, No. 3.

The Court: It will be so admitted and marked. Plaintiff's Exhibit No. 3 is a letter addressed to Aaron Ferer & Sons, attention Mr. Morris Ferrer, signed, Richfield Oil Corporation, H. H. Kelly, Purchasing Agent, dated January 2, 1941, confirming a conversation of the same date, accepting the said offer, Plaintiff's Exhibit No. 2. I am familiar with a piece of thin white paper, typewritten, marked "Sale of Materials and Equipment at Casmalia," which has heretofore been offered by the plaintiff as Exhibit No. 1 for identification. I prepared it. January 8, 1941, indicates the date when it was prepared. The initials, H.E.D. are my initials.

Mr. Sturzenacker: We would like at this time to offer this in evidence with the same number, Plaintiff's Exhibit No. 1.

The Court: It may be admitted and so marked. [R. p. 219.] Plaintiff's Exhibit No. 1, bears the caption "Sale of Material and Equipment at Casmalia." It is addressed to Aaron Ferer & Sons, acknowledges "payment: Cashier's or Certified check in the amount of $22,000.00, payable in advance, and describes material and property sold, and enumerates "exceptions", signed at the bottom, "H.E.D. (Stamped) Pltf's Ex. No. 1. Filed 9/3/42.

Q. By Mr. Sturzenacker: Mr. Davis, called your attention to Plaintiff's Exhibit No. 2, this offer, it says, "We are pleased to submit our bid in the sum of $22,000.00 to cover all tanks, pipe, valves, fittings, buildings, boilers, and all other materials now situated on your Casmalia refining and producing property, plus pipe line running from the aforesaid property to and including loading rack adjacent to the railroad track, one-half mile west, including boiler and other incidental materials. We exclude the following "items" and then appears "superintendent's house, car barn", and so forth. Did you have any inventory of that property on the Casmalia lease at that time? A. We had an inventory that was several years old. I did not have one in my possession. I was not familiar with all of the tanks that were on the property. At that time when we received this bid from Mr. Ferer our company was to reserve six large steel storage tank [R pp. 221-222]; I imagine there were more than 25. There was a few tanks immediately surrounding the refinery property which were used in connection with refining. I assume the rest of them were production tanks. These six steel storage tanks that we reserved, I think most of them were on the north side of the creek, near the machine shop. I believe they were just north of the creek. There might have been one of them south of the creek. Six shell stills, plus one shell still still bottom were previously sold to the O. C. Fields Company. I had conducted that sale. [R. p. 223.] Certain 4-inch tubes were previously sold to the West Coast Oil Company. We were reserving the superintendent's house and garage and the building now used as the cow barn. When I was up there in September I didn't notice any cows around the place. I think most of the tanks had

a little oil. One of them had considerable oil that was sold to the Casmite Company or stored for the Casmite Company. Those numbers in the letter of acceptance of January 2 were put on by the operating department. Twelve dehydrators belonging to the Petroleum Rectifying Company, are mentioned in this acceptance. They belonged to that particular firm. [R. p. 224.] I had a telephone conversation which that letter refers to. I dictated the letter.

Q. At this telephone conversation, did you discuss with Mr. Ferer excluding any other property from the sale except that mentioned in this letter of December 10, 1940? A. I think not. [R. p. 225.] But the letter was written immediately after our conversation which would indicate that we had covered everything in the letter. The information that I got about the storage [R. p. 58] tanks came to me from the producing department. I believe that note was written when Mr. Ferer was there. He was present while I dictated this letter and I handed it to him. On this notation we stated. "Purchaser shall remove all oil in tanks from the property". That was oil that had been produced on those premises so far as I know. I don't think it had been stored there by Richfield [R. p. 226] I don't know what this property was being used for. Nothing, I presume. I put in the clause that it was to be fenced so the cattle couldn't get into the sumps. There may have been cattle grazing around there. However, that is a problem that is taken care of by the operating department again. Someone in the operating department told me to do that. I also added in here, "All ditches and pits should be filled in after removal of the pipe and other equipment and left in safe condition

I believe it was part of my idea. [R. p. 227.] That was to fulfill the previous clause relative to the instructions I had received from the operating department to prevent the cattle from getting bogged down in the sumps and so forth. I stated, "All ditches and pits should be filled in after removal of pipe." I knew that the pipes in Casmalia on the lease there that were to be removed were, some of them, below the ground. I say here, "All ditches and pits should be filled in after removal of pipe. It is possible in removing any pipe lines which were underground that pits and ditches would, naturally, be made which were to be filled in after those pipe lines were removed. This ground is rather uneven and sort of rugged. [R. p. 228.] It was possible for me to see on our trip up there, while I was examining the refining unit, pipe lines that ran from there to other tanks in the field. I saw other tanks where the pipe line was coming up out of the ground and going into the tanks. I believe the letter was written after that telephone call accepting his bid. And then they arrived at my office—just Mr. Clements and Mr. Ferer. I had a conversation with the two gentlemen at that time. As I recall, Mr. Clements asked what our reason was for not selling the six remaining tanks or the six tanks which we were excepting, and I called Mr. Montgomery and asked him why he wanted to retain those tanks and he explained again to me that it was for the purpose of storing oil in the event of and when we might reopen some of the wells for production. I told that to Mr. Clements and to Mr. Ferer. The pipe lines up to the tanks were sold up to a certain point. As to how close to the tanks those were marked on the property, I imagine, around three or four hundred feet away from the tanks except any pipe lines interconnecting those six tanks we

were to retain. As to whether I told him that those pipe lines to those tanks were to be excluded I believe it is in the contract. I am familiar with the contract that was finally adopted.

Mr. Krasne: Perhaps Mr. Paradise will stipulate that there was no exclusion for any of the pipe line running up to those tanks provided for in the contract. [R. pp. 229, 230.]

Mr. Paradise: No; that is not correct. They were excluded. I might perhaps save time, because there is no mention of that in the contract, by saying the exclusions are shown on the map, Mr. Sturzenacker, if you care to borrow that.

Q. By Mr. Sturzenacker: Will you glance through this contract, Mr. Davis, and show me if there is any place in the contract that excludes the pipe lines running up to the tanks. A. Here is one place, Mr. Sturzenacker.

Q. Where is it? A. Right here.

Q. You are pointing not to "and major suction and discharge oil pipe lines connecting such tanks approximately as indicated in red on the map attached hereto and marked Exhibit A. A. That is right. I believe we did discuss those pipe lines running to and from those tanks. [R. p. 231.] The original contract with the map attached to is introduced by stipulation as the plaintiff's exhibit next in order, No. 4. Plaintiff's Exhibit 4 is identical to Exhibit "A" to Amended Complaint. [R. p. 232.] Referring to Plaintiff's Exhibit No. 4, which is the original contract and the map attached thereto some red lines around a circle, which is marked "Riveted steel tanks" and so forth enclose the six tanks that were referred to in the exceptions to the contract. The red lines leading from

tank to tank are the lines that I referred to that were excepted. We discussed excepting the water lines that were to be used to serve water to the superintndent's house and the cow barn or, rather, the watering trough for the cattle and also the gas line which was to be used for bringing gas from one or more wells, whichever was necessary, in order to furnish the superintendent's house with gas. The pipe line, the gas pipe line, that is excepted, is the running along from the portion near well No. 36. [R. p. 233.]

That pipe line where the loading rack was, was included in the sale of equipment to Mr. Ferer. I don't believe that there were pipelines running from tanks in various portions of the field to these tanks that were excluded. Those were communicating lines between the tanks which we were reserving. [R. p. 235.]

Q. None of those lines that are in red go to any wells, do they? I mean the lines that are around the tanks, with the exception of the gas line that you referred to a few moments ago? A. I don't believe they do. [R. p. 236.]

Smaller lines on the inside of the large gathering lines indicate to me that they might have been steam lines used to heat the oil. These steam lines were connected with boilers and other equipment on the field that were used for heating steam and running it through the lines. I imagine they would be hooked up to boilers or were at one time. The boilers were still there. Those boilers were still there. Those boilers were included in the sale of merchandise to Mr. Ferer. [R. p. 237.] I believe we

asked the refinery department if they wanted any of the material or equipment that they might use on some other facility in some of our other operations. My information came from the production department. [R. p. 238.] They told me to exclude these tanks and the pipes running from the tanks. Mr. Montgomery gave me an instruction to exclude the superintendent's house and the cow barn. I discussed the sale of these salvage goods with Mr. Clements and Mr. Ferer, and Tom McGeeny of the Union Oil Well Supply Company at Long Beach. [R. p. 239.] I received other bids from other persons for the purchase of equipment on the Casmalia lease. We had a number of different types of bids. Some bids were submitted on buildings only and some on other individual pieces of equipment. [R. p. 240.] I believe the other bids that we received were in writing. [R. p. 241.] This bid from Mr. Ferer came to Mr. Kelly and then to me. I discussed it with Mr. Kelly, and later on Mr. McGahan.

Redirect Examination.

I testified that in connection with this sale of tubing and sucker rods and the derricks to Mr. Anderson I had an inventory of the tubing and sucker rods. I received that from the production department.

A. It is my understanding that it was an inventory that had been prepared or a record, rather, that had been prepared of the installations as they were made during the time when the property was operated. [R. p. 242.] The

inventory had been prepared prior to that time. Some of the derricks had fallen down and those remaining erect were in pretty bad shape. They were composed of wood. [R. p. 243.] Mr. Anderson was required to pull the tubing from the wells which he could recover. [R. p. 244.] The first conversation I had with Mr. Montgomery was, I believe sometime in September or October of 1940. [R. p. 246.] That was after Mr. Kelly instructed me to make arrangements for this proposed sale. [R. p. 247.] I asked Mr. Montgomery to give us an inventory of what items, what surface items, he wanted reserved and not sold off of the property. [R. p. 248.] In our conversation I mentioned Casmalia. In first contacting Mr. Montgomery, he stated that there were certain tanks and certain lines which were to be excepted. [R. p. 249.] I don't recall whether he specified why he wanted those specific items excepted or not. I had another telephone conversation with Mr. Montgomery on December 8th, when Mr. Clements and Mr. Ferer were present in your office. This was in the presence of Mr. Ferer and Mr. Clements. [R. p. 251.]

Those are the six tanks that were excepted. And so I called Mr. Montgomery on the telephone and asked him why those tanks were not included in the sale and he said he wanted to retain them in the event that the wells were ever opened up for production; that those tanks would be used as storage. I repeated the conversation to them as soon as I hung up. [R. p. 252.]

H. E. DAVIS,

recalled.

Redirect Examination

resumed.

Q. By Mr. Paradise: Mr. Davis, what instructions did you receive from Mr. Kelly at the time of the commencement of this transaction? [R. pp. 257, 258.] A. He instructed me that the management desired to dispose of certain surface equipment facilities at the Casmalia property and to contact the interested parties to find out what, if any, of the surface equipment was to be retained on the property. My duties as a buyer in the purchasing department also included the sale and disposal of salvage equipment. In connection with transactions for the sale and disposal of salvage equipment I have on occasion used the words, "surface equipment", numerous times. Surface equipment is a common and ordinary phrase in the oil industry. It pertains generally to equipment and facilities located on top of the ground and, to go further, pipelines, some of which might be buried a small amount underground. Pipelines are considered surface equipment in the oil industry. [R. p. 260.] There are other types of equipment in an oil field which are not surface equipment. There is subsurface equipment. Illustrations of subsurface equipment are casing in the well, tubing, sucker rods and deep well pumps. The common and ordinary meaning in the oil well industry of subsurface equipment is, more, I suppose you would say, in a vertical position in the ground. Generally speaking, casing is cemented in the well. [R. p. 261.]

In the telephone conversation to which I testified yesterday I told Mr. Montgomery that we were making ar-

rangements to dispose of certain surface equipment at Casmalia and asked him what exceptions there were or what items of equipment he wished to retain on the property. There were six tanks that he wished to retain and a gas line to supply to (100) superintendent's house with fuel and a water line and the water tanks and water pump. There were to be interconnecting lines which were also to be retained around the tanks. [R. p. 262.]

At the Court's request, I have produced the contract, dated March 12, 1940, between Richfield Oil Corporation and W. R. Anderson, doing business under the name of Petroleum Service Company.

Mr. Paradise offers in evidence a certain written instrument. On stipulation of Mr. Sturzenacker, the Court orders the same admitted and marked Defendant's Exhibit No. A being a contract between Richfield Oil Corporation and W. R. Anderson dated March 12, 1940. [R. p. 265.]

The Witness: I am familiar with this contract. Casing is ordinarily cemented in a hole and referred to at times as the protective string. Tubing is generally used to produce the well through the tubing, that is, to bring the oil up through the tubing. Paragraph 4 (e) of this contract reads:

"It is expressly understood and agreed that in connection with the work described under sub-paragraph (d) hereinabove, contractor shall not be required to engage in 'fishing' for any of the pumps, rods, and tubing in said wells which, prior to the commencement by contractor of such work, shall be stuck, frozen, parted or collapsed in the respective wells; provided, however, that in the event that any of said pumps, rods or tubing shall

become stuck, frozen, parted or collapsed as a result of the performance of any of contractor's work, contractor shall, at its own cost and expense, perform any 'fishing' operations necessary to remove the same. In the event that contractor shall discover that any pumps, rods or tubing shall be stuck, frozen, parted or collapsed, as aforesaid, contractor shall immediately report the same in writing to Richfield's representative." I conducted the negotiations for the execution of this contract. The production department instructed me concerning the inclusion in the contract of the paragraph I just read. [R. pp. 279, 280.] Referring to Plaintiff's Exhibit No. 4, which is the contract between Richfield and Aaron Ferer & Sons, and to the map attached thereto as Exhibit A, on this map you will note that this line is a 2-inch gas line. I am referring now to the line in red that leads up to Well No. 36. This line also extends to the lower end of the map. That is in an easterly direction, and then runs north to Well No. 44. The line is in red. We stopped here and put in this stipulation that states, "And any extensions of gas line necessary to furnish gas to Duncan's house." [R. p. 281.] This line extends on beyond Well No. 44 and apparently is split up in two lines and it goes on to Well No. 46. This is the same 2-inch gas line extending on here and from there it goes up to a boiler house, apparently. [R. p. 282.]

Recross-Examination

By Mr. Sturzenacker:

Mr. Montgomery first told me to exclude these gas lines or this gas line running to Mr. Duncan's house some time during the latter part of September or the first part of October. I read Mr. Ferer's offer of December 2nd

that has been introduced here as Plaintiff's Exhibit No. 2. Nothing was said in there about reserving the gas line, was there. That is right. I had a telephone conversation with Mr. Ferer about the 2nd of January, which is the same date.

Q. I show you Plaintiff's Exhibit No. 3 and ask you if you said anything in there about reserving the gas line. A. Apparently not. [R. p. 282.]

Q. On the 8th of January, when Mr. Ferer and Mr. Clements came to your office and gave you the check for $22,000, did you have any conversation with them at that time about reserving the gas line? A. I may have. I don't remember.

I wrote a memorandum when they were there at that time. That is right. Looking at Plaintiff's Exhibit 1, there is not anything on there that says anything about reserving the gas line.

Q. Isn't it a matter of fact that the first time you heard anything about reserving that gas line was after you had accepted Mr. Ferer's bid and received his money? A. No; I don't think it is.

Q. But you never discussed with Mr. Ferer or anybody connected with his organization the question of reserving that gas line? A. Not that I recall.

I testified this morning that in my first conversation with Mr. Kelly he told me to make arrangements or to start to make arrangements to sell the surface equipment of the Casmalia lease. [R. p. 283.] That was some time in August or September, 1940. I read the communication of Mr. Ferer which was received in my office on the 11th of December, Plaintiff's Exhibit No. 2.

There is not anything I recall in this document that says anything about purchasing the surface equipment on the Casmalia property. As a matter of fact, it says the refining and producing property.

Q. Did you say anything in your telephone conversation with Mr. Ferer on the 2nd of January about Mr. Ferer only purchasing the surface equipment on the Casmalia property? A. I don't believe I did.

There is not anything in your Exhibit No. 3, which is the letter of the 2nd of January, that says anything about Mr. Ferer purchasing the surface equipment on the Casmalia property?

Q. And is there anything in your note or memorandum of the 8th day of January, Plaintiff's Exhibit No. 1, that says anything about just purchasing the surface equipment?

Mr. Paradise: If the Court please, I object to this line of questions and move to strike the answer to them. [R. p. 284.]

The Court: I think the fair meaning of the testimony and all counsel really means is that the term "surface equipment" is not used in any of the exhibits referred to and that that is all the witness means by his testimony.

Mr. Paradise: Yes.

Mr. Sturzenacker: That is satisfactory.

Mr. Clements and Mr. Ferer came to my office in response to the letter which I had written on the 2nd, telling them to come in within 10 days with a check for $22,000, and to deliver the check to me, and I made up this memorandum, and then some conversation was had between me and Mr. Clements relative to the sale by Richfield and

the purchase by Ferer of some of the excepted property, to-wit, the tanks; it was at that time I called Mr. Montgomery. [R. p. 285.] The conversation took place before this Exhibit No. 1 was drawn up. [R. p. 286.] The reason for their visit there was to comply with my letter of January 2nd, signed by Mr. Kelly—to come in with a check. I am familiar with what is necessary to produce oil wells to a certain extent. I am familiar with this Anderson contract. [R. p. 287.] This contract, referring to page 3 and to the paragraph designated as paragraph (a), I am familiar with that clause. Under that clause Anderson was to dismantle all of the derricks. [R. p. 288.] He was to take it away and burn up all of the wood and refuse resulting from that. Under paragraph (b) he was to clean out all of the cellars, pits, and sumps, and dispose of all the oil, tar and waste. He was to fill up all of the cellars, pits, and sumps. We required him under this contract to leave the tubing and the sucker rods on the property until such time as he had completed this work. I didn't question the reasons why they were removing the tubing and sucker rods. The production department told me to have the tubing and the sucker rods removed, the derricks pulled down, the cellars and pits filled up and the sumps cleaned out and filled. [R. p. 289.]

The fact that my inventory showed that there were tubes and sucker rods and pumps in the wells would indicate to me that they were necessary in order to produce those wells. I would assume that. In this conversation on the 8th of January Mr. Montgomery said that he wanted to keep the tanks there for storage in the event they reopened the wells for production. I knew there

were pipelines running from those wells to certain storage tanks. [R. p. 291.] We meant in this sale to include those pipelines running from those various wells to production tanks. Mr. Montgomery didn't tell me to reserve those pipelines from those wells to tanks, the storage tanks. I am familiar with the rest of the bids that have been received by my company. There are only approximately three bids that were bidding on the whole equipment. Three or four of the Western Oil Fields Supply Company and one of R. Levinson and one of Dulien Steel Products, Inc. were three that were received by me for the purchase of the equipment at Casmalia. [R. p. 292.]

As to whether at the completion of the handing of this note or memorandum Exhibit No. 1, to Mr. Ferer and Mr. Clements I had a further conversation with them. I think not. I thought we went up to Mr. Paradise's office right away. [R. p. 300.] I had a conversation with Mr. Paradise and the gentlemen there. We merely discussed the formulation of the contract. I presume Mr. Paradise made notes or record of it. I showed him a copy of my memorandum that I had handed to Mr. Clements and Mr. Ferer that day, about excluding various things from the contract. I believe that was covered by Exhibit 1. [R. p. 301.] And my best recollection at the present time is that I did not show Mr. Paradise the offer of Ferer & Sons on the 10th day of December or the acceptance of the offer by the Richfield Corporation on the 2nd day of January. This exhibit numbers of those two instruments are 2 and 3. [R. p. 305.]

On January 8th Mr. Anderson had completed his work on the property. All of the derricks had been removed. I was up there in September. I didn't see any still stand-

ing. My records indicate that all of the work covered in the Anderson contract had been completed, including the cleaning out of the sumps and filling them. [R. p. 306.] There was a pipeline from the property to the loading rack. My description of surface equipment is that which is above the ground, and that which is buried to a shallow depth below the ground. That shallow burying would be about two feet. Mr. McGahan in my presence supplied Mr. Paradise with information relative to this contract. [R. p. 307.] One time that I know of was at the same time when Mr. Ferer and Mr. Clements and Mr. Paradise and Mr. McGahan and I all met in Mr. Paradise's office. I would say that was the day that we discussed the formulation of the contract. It was before the 17th of January. I do not recall at this conference in the office of Mr. McGahan stating to Mr. Paradise, in the presence of Mr. Clements and Mr. Ferer, that the only property sold or contemplated to be sold was the surface equipment. [R. p. 308.] I was never present at any other conference between Mr. Ferer, Mr. Clements and Mr. McGahan. I discussed the exclusion of the gas lines with either Mr. Ferer or Mr. Clements on some occasion. I believe that occurred on the occasion they came in and left the check with us for the sale of the equipment. In the common meaning of that expression, "surface equipment," pipelines are referred to as surface equipment. [R. p. 309.] These gas lines were discussed at the meeting with Mr. Ferer and Mr. Clements both in my office and in Mr. Paradise's office on the same day. [R. p. 310.] But I did not include the gas line in the memorandum Exhibit No. 1. I did include the water lines and the pumps. As a matter of fact, it was on the 8th when Mr. Clements and Mr. Ferer

were there, I actually discussed the water lines and the pumps. I believe they were discussed in my office also. I knew when I drew the memorandum that the gas line was to be excluded. I undoubtedly forgot it. [R. p. 311.]

HERBERT HUDSON KELLY.

Cross-Examination

By Mr. Sturzenacker:

Before proceeding with the cross-examination of Mr. Kelly, may we refer to the affidavit of Mr. Kelly on file and make certain motions to strike? [R. p. 314.]

The Court: I think what we ought to do at present is this, to deny the motion without prejudice to your renewing it. [R. p. 316.] They are ordered stricken out. [R. p. 318.]

Mr. Sturzenacker: We move to strike the remainder of that paragraph on the ground it is all alleged on information, that. "That affiant was and is informed by the production department of Richfield Oil Corporation that no casing can be removed from any oil well in California without abandonment of such well." [R. p. 320.]

Mr. Paradise: I will consent to the striking of that clause. That is from lines 10 to 27? [R. p. 320.]

The Court: That is, beginning with the words, "That affiant was"? [R. p. 321.] It is ordered stricken out. [R. p. 321.]

The first time that I met Mr. Ferer or Mr. Clements in connection with this transaction was January 8, 1941, when they brought in the check. Mr. Davis brought the check from his office to mine and I said I would like to

meet the gentleman. At that time this acceptance of the 2nd of January, Plaintiff's Exhibit No. 3, had already been signed by you and forwarded. Mr. Davis dictated and I signed this letter. Prior to that time, I had seen the offer of Mr. Ferer, Exhibit No. 2. [R. p. 322.] Referring to Plaintiff's Exhibit No. 1, which apparently is a memorandum of sale, Mr. Davis brought this to me and I approved the contents. I remember that. The first time that I did see it was the same day that Mr. Aaron Ferer and Mr. Clements and Mr. Davis were in my office. [R. p. 323.] I was not present in Mr. Paradise's office when the formal contract was drawn. I am familiar with the so-called Anderson contract. I knew what that provided for in the way of sale. Was producing equipment. I knew these wells had never been produced by Richfield. The superintendent's house and the cow barn wasn't part of the production equipment. [R. p. 324.]

I have been on the property once, about March 1941. Mr. Ferer was removing the stuff at that time. The pumphouse was still there, and the field office. I knew those were included in the contract with Mr. Ferer. [R. p. 325.] I know of boilers on the property. I knew those boilers were included in this sale to Ferer. And the pipelines to the boilers, except those that were reserved as connecting the six storage tanks. [R. p. 326.]

The information to which I refer I had at the time I signed the contract in question, which is dated January 17, 1941. I had that information prior to that time. [R. p. 329.] I executed this contract, Defendant's Exhibit A. I was familiar, at the date of the contract, with the fact that the derricks, tubing and rods, were to be removed. In August of 1940, a discussion

of withdrawing tubing, sucker rods and pumps, was brought up in the general meeting. That was a period after the execution of the contract with Mr. W. R. Anderson. [R. p. 330.] I have attended that meeting. The president, Mr. Jones, and three vice-presidents, Mr. Morgan, Mr. A. M. Kelley, and there was Mr. Montgomery and Mr. Autrey and Mr. Dinkins, Mr. Gross and Mr. McKay and myself. Mr. Boner and Mr. Ragland, and I think that is all. They are all heads of their respective departments. [R. p. 331.]

The production department, through Mr. Montgomery, brought the state of these particular wells to the attention of the management and Mr. Jones and recited that, the oil being of a corrosive nature, it had or possibly had corroded the tubing and the rods to the extent that it would be better to pull them at that time than to wait until a later date, where they might have great difficulty in pulling them. [R. p. 332.] That was discussed at that meeting to which I have referred. [R. p. 333.] Mr. Montgomery was the principal talker and it was mostly on his decision, approved by the balance of the management, that it be done and provision made for future control of the wells. [R. p. 334.] The discussion relative to this Anderson contract was prior to the date of this contract and the discussion I have just referred to was relative to this contract. [R. p. 335.] The question of the removal of the tubing and rods and derricks from Casmalia was not discussed by Mr. Montgomery or by anyone else at any of the executive meetings which occurred before I signed that contract with Mr. Anderson. At these executive meetings, there was discussion concerning the production of oil from the wells at Casmalia. Prior to January 17, 1941. [R. p. 336.]

Recross-Examination

By Mr. Sturzenacker:

When the conversation that took place in this meeting of August 1940, the rods and tubes had been removed from the Casmalia wells. [R. p. 336.] The derricks had been removed. Discussion was had at that time about keeping the production equipment there for the purpose of producing those wells again. The only equipment to remain, surface equipment, was that indicated on the map in red. That was the time that the powers that be, authorized me to sell the rest of the equipment on the Casmalia lease. Nothing was said at this meeting about reserving any pipelines. [R. p. 337.] This tubing that was mentioned in the contract with Mr. Anderson is not casing. I signed this contract. This contract was prepared by Richfield. I wasn't prepared by Mr. Anderson. At this meeting nothing was said by Mr. Montgomery or anybody else about the rods and tubing corroding. [R. p. 338.] That wasn't discussed. [R. p. 339.]

At the August meeting they then directed me to remove the surface equipment. This was in August, 1940. I did not ever communicate with Mr. Ferer or Mr. Clements or anybody connected with his institution or his company [R. p. 340.] I had that in mind, that we were just going to sell the surface equipment when Mr. Davis showed us this memorandum which has been introduced as Plaintiff's Exhibit No. 1. I read it at that time. I noticed what it says on the fourth line, "Everything will be sold to the above with the exception of the following". I don't see where the words "surface equipment" are written into this. [R. p. 341.] I read those documents and saw that they didn't mention surface equipment. I did not com-

municate the fact that I was authorized only to sell surface equipment to Mr. Ferer or anybody connected with his concern. Speaking of 1941, that is, after the Ferer contract was signed, there was not a discussion at that time about ropening this field and trying to produce these wells. Not to my remembrance. These wells, never have been produced up to the present time. Not to my knowledge. Whether it had been decided within the year 1941 and after the Ferer contract was signed that the Richfield would attempt to produce these wells again, I couldn't say. [R. p. 342.] I could say that it had been discussed. Since the signing of the Ferer contract, it has been mentioned two or three times. It was discussed after I went up and visited on the property. [R. p. 343.] It is a matter of fact that our company gave Mr. Ferer notice to hurry up with the dismantling of the producing and refining facilities on that property after I visited up there in March. And after the question about reproducing the wells had been discussed in our board meeting, I didn't make any investigation myself before I signed the Ferer contract as to what portion of the merchandise sold to Mr. Ferer could be used in producing these wells. If a discussion took place in August, 1940 relative to reproducing this field, I was authorized to sell the producing equipment because we were afraid that, if—or let me put it this way, that the equipment as it was offered for sale would not have been in good enough condition in our estimation to have produced a well. Mr. Montgomery did not say anything about the half a mile pipeline running to the loading rack. [R. p. 344.]

The rest of the pipelines, the gathering lines, that went to the tanks and the boilers that heated the steam, was

described as surface equipment and should be removed and sold. Even though they were talking about reopening the field, nothing was said about reserving the oil house or the blacksmith shop. [R. p. 345.] Mr. Montgomery did not say he wanted the log books preserved. Not to me. Nobody said anything about saving the records of the wells and log books. Not to me. Or the field office, not to me. The contract with Mr. Anderson is dated March 12, 1940, there were discussions in the executive meetings that I have mentioned concerning the removal of the tubing and rods and derricks from those wells at meetings which occurred prior to the time that contract was signed. It was decided to remove them and my instructions were given to formulate the contract. [R. p. 346.] Mr. Montgomery made that as to the condition of the tubing and rods and derricks on the wells, one or two weeks previous to the contract of March 12, 1940, with Mr. Anderson. In August of 1940, at that meeting there was no discussion of this Anderson contract or of the removal of the tubing and rods under this contract. At that meeting the removal of the surface equipment was discussed. That was approximately the time when I instructed Mr. Davis to prepare for the sale of salvage equipment at Casmalia. [R. p. 347.] Referring to a paragraph in the Anderson contract on page 4-a which states, "Contractor shall not remove from any wells any of the casing or liners now installed therein other than said tubing, rods and pumps above described," I had this provision of the contract in mind at the time I signed that contract. I did sign a contract to allow them to remove numerous quantities of lapweld casing, which casing was used as tubing. I do not know of my own knowledge at all what the casing in the wells was. [R. p. 349.]

FRANK I. MCGAHAN,

called as a witness on behalf of the defendant, being first duly sworn, testifies as follows:

Cross-Examination.

[R. p. 350]:

The first time I received any instructions to sell any property at Casmalia was about two or three days before September 21st. [R. p. 351.] When I went on the property, I had an equipment map which the company usually has on leases of that nature and, as I made frequent trips after that date, after the 21st of September, I checked the equipment on this map and compiled notes in my notebook. I had a map which I understand is the same as the one attached to the contract. When I went up there in September, I knew there were some oil wells on the property. Much of the equipment that was there could be called producing equipment. There were some boilers. I was never there when the wells were produced. [R. p. 352.] I have been in the oil industry for some years. I am familiar somewhat with the transportation of oil through pipe lines. The type of oil that was produced at that Casmalia field was a very heavy grade of oil. That oil will flow through a pipeline, on a hot day, it would flow and on a cold day perhaps no. For the purpose of transporting the oil, it was necessary to have steam injected in the line in most cases. [R. p. 353.] Most of the tanks had oil in them. The steel tanks were in good condition but the galvanized tanks, that is, the corrugated flat tanks, were most of them in very bad condition. Of the steel tanks there were on the property 10 or possibly 12 steel tanks. Of the galvanized tanks, there was a large number. Under this contract some of

the steel tanks were sold, and all of the galvanized tanks, except one. [R. p. 354.] Some of the pipelines were sold under the contract. Those pipelines were not necessarily on the surface of the ground. Some of them were perhaps entirely under the surface from the beginning to end. They may have been buried from perhaps two feet to eight or ten feet. I consider pipe that is buried eight or ten feet as surface equipment. [R. p. 355.] I saw Mr. Clements out there twice, once before there was any work started and once while they were working on the lease. I am positive the second time I saw him was after the contract was signed. I looked over the number of times. In some cases the condition was bad and in other cases it was fair. Some of the pipes were in such a condition that they might be used if the field was going to be produced. The loading line that went down to the loading rack, was about a half mile long. The pipe was 6-inch [R. p. 356.] I believe the only outlet from the lease was these storage tanks, which was this 6-inch line, the loading rack line. Nobody ever told me, connected with Richfield, that, in August and September, 1940, they were going to reopen the field and produce oil from those wells. I did not offer this equipment for sale. I simply contacted and told people about it and took them up there and showed it to them. [R. p. 357.] I am in charge of the salvage department of Richfield. It is my job to dispose of surplus and useless goods, also, to salvage second hand materials that can be used or are usable by your company in other places. I have charge of the stores. [R. p. 358.] I actually went on the portion of the property where the wells are located. To be exempted from sale were: the oil wells, the six steel tanks, the dehydrators located on the lease, which did not belong to us,

and the superintendent's house and I believe the cow shed and the superintendent's garage and a 2-inch gas line from the superintendent's house to one or more of the wells. [R. p. 359.] Either Mr. Kelly or Mr. Davis told me that the oil wells were to be exempted, in a conversation in their office just prior to September 21st. I knew that the rods and the casing in the wells that had been used for tubing had been pulled out. I knew the derricks had been taken down. The condition of the boilers was that for ordinary modern practice they were obsolete. [R. p. 360.] I believe that I have known Mr. Zeidenfeld for possibly 7 or 8 years. During August or September, I talked to Mr. Zeidenfeld about this Casmalia property. He was buying from the company all kinds of obsolete scrap materials. Those purchases might run from 10 or 15 tons up to perhaps 100 or 200 tons. [R. p. 361.] The conversation took place in my office in Long Beach. [R. p. 362.] I said, "I have completed my little compilation here of the material on the lease up there and have it here so that I can tell you approximately how many boilers and how many pumps and how many engines and how many tanks and so on and how much pipe there is." And I said, "I have it here page by page, with the quantity and a weight estimate." And then I said, "I also have totalled up the entire weight estimate and have arrived at a figure of 1,500 tons, divided as you see it on these several sheets." I asked Mr. Zeidenfeld the first time I mentioned the pending sale to go up there with me sometime and look at it. I knew that he had not seen the property. This conversation took place the last of November or the first of December, 1940. [R. p. 363.] I told him how many tanks there were on the property,

and about tanks being excluded. [R. p. 364.] I referred to this property for sale as the Soladino lease. I referred to the fact that there was a refinery on the site. I got my information as to the various numbers of fittings and so forth from the equipment map in the past inventories that had been taken. Those inventories were not taken by me. They were taken by people working for Richfield. I believe that the last inventory taken on that lease was in 1930. [R. p. 365.] I knew the derricks had been removed. [R. p. 366.] I could not say that I ever told Mr. Zeidenfeld that the casing on the property or the wells on the property were to be excluded from this sale. Whether the casing or the wells on the property ever mentioned in any conversation between me and Mr. Zeidenfeld, to the best of my knowledge, they were not mentioned. I was present when the final contract of the terms of the final contract were gone over in Mr. Paradise's office. I had met Mr. Ferer, I believe, once or twice before that. I had met Mr. Clements before. I was present at this conversation in Mr. Paradise's office. I can't say I remember anything specifically mentioned about the wells in that meeting other than in connection with the gas line, which I remember being mentioned as being an exception which was to be made. [R. p. 367.] I knew there was casing in the wells. I knew that those casings and wells so far as our company was concerned were to be excluded from the sale. I saw the excluded items on there. I didn't see any casing excluded. [R. p. 368.] Or any wells. I did not say anything about not selling the wells or the casing or not mentioning them in the exclusion. I recall one change, and that was, I believe, the words "lumber and metal" were added. That

change was made at Mr. Ferer's request. I told Mr. Zeidenfeld that the estimate that I had of tonnage might or might not be correct because Richfield had only old records of the installations on this property. I asked him to go up there with me. He did not go up with me. I am not a petroleum engineer. [R. p. 369.] I never had any experience in the abandoning of oil wells. [R. p. 369.] Some of the casing can be removed under some circumstances without the abandonment of the well. I was not familiar with the casing record in these wells. I never saw the log books of the wells. [R. p. 370.]

FRANK I. MCGAHAN

recalled.

Cross-Examination

resumed.

At the time I was present at the meeting in Mr. Paradise's office, I don't remember whether or not this map which has been offered in evidence and attached to the contract in evidence was around there at that time. [R. p. 373.]

Not being sure whether I saw the map or not, I couldn't say whether I saw these red marks on that map in Mr. Paradise's office. I, myself, didn't make any of those exclusions or the red marks on the map. After receiving these instructions from Mr. Davis about selling the salvage equipment at Casmalia, I invited a lot of different people to bid on it. I remember the Union Oil Well Supply Company, for one, the Atlantic Supply Company as another one and the Western Oil Field Supply Com-

pany and I believe also that there were a number of the salvage companies here in Los Angeles. I did not furnish any of them any inventory. [R. p. 374.] I did not receive any bids. I don't remember of seeing the map with the markings on it at the meeting in Mr. Paradise's office, however, the map may have been there. After this conference in the office, I never did see the map. I am Supervisor of Storehouses. My duties have nothing to do with either the drilling of oil wells or the production of oil wells, or with the operation of oil fields where oil is being produced by Richfield. [R. p. 375.] It is part of my duties to assist the purchasing department in showing the salvage material to prospective bidders, as to what equipment is to be sold and what equipment is not to be sold. I obtain instructions in that respect from the management, the exploitation department. Mr. Montgomery is the head of that department. With respect to the sale of equipment at Casmalia, my preliminary instructions were from Mr. Montgomery. I received detailed instructions from the purchasing department. [R. p. 376.] The determination, of what equipment was to be sold was contained in those instructions. My instructions were to take prospective bidders to Casmalia and show them the surface equipment which we had for sale. The description was given as the surface equipment less certain things which were to be retained by the company. The exclusions were certain tanks, dehydrators, certain pipelines and some stills, that is, still bottoms and some stills. [R. p. 377.] The tanks that were included ranged all

the way from 20- to 30-barrel up to 5,000 barrels. They were located all over the lease. [R. p. 379.]

There was nothing other than the tank bottoms of oil in the tanks. Tank bottoms is the sediment in the bottom of the tank. I told Mr. Ferer the surface equipment less certain exceptions was to be sold. I told him that in our first conversation, with Mr. Ferer, some time between September and the first part of December. I don't remember just when. [R. p. 380.] I told Mr. Clements the same thing; the surface equipment less such items as the company wanted to retain. That conversation, to the best of my knowledge, took place around the first of November, 1940. I told Mr. Zeidenfeld that we were to sell the surface equipment less such items as the company wished to retain. [R. p. 381.] That conversation took place sometime in August or September, 1940. [R. p. 382.] I told Mr. Clements at the time I talked to him that I hadn't completed going over the lease yet and that I wasn't exactly sure what the company might wish to retain of the surface equipment and what they might want to sell. It was in the form of notes in my notebook. 10 pages of pencil notes are marked as Defendant's Exhibit 1 for identification. [R. p. 383.] These pages were shown to Mr. Zeidenfeld at that occasion. I told Mr. Zeindenfeld that I had now completed more or less of a record of what was up there and what we were going to sell, so I opened up the book and we went through these various pages and discussed the items on each one. I discussed

each page with Mr. Zeindenfeld. [R. p. 384.] I told him that my estimate was 1,500 tons. I told him the portion of the 1,500 tons was my estimate of the pipelines on the property. That estimate was approximately 920 tons. [R. p. 385.]

Recross-Examination

By Mr. Sturzenacker:

To the best of my knowledge and in going over the lease, I didn't find any of these tanks, which were included in the sale, which were full of oil. I couldn't state that I examined all of the tanks in the field that were sold, because there were so many tanks or many tanks that I didn't look at, that is, not the tanks to be retained. [R. p. 400.] The ones that I didn't look at, no; I couldn't state that they were not filled with oil. I don't know where that oil had been produced from. [R. p. 401.] I never took Mr. Ferer up to the field to show him the property. This first conversation with Mr. Ferer was over the telephone. He asked me what the company was going to sell. I told him we were going to sell the surface equipment from the lease less certain items which were going to be retained. [R. p. 402.] This first conversation I had with Mr. Clements was somewhere around the first of November. I didn't know whether he had any acquaintance with the field or not. As to what I told Mr. Zeindenfeld, I don't remember any particular thing, anything else, although we had a discussion of the matter and I might have told him a number of things. I can't

recall any particular item. [R. p. 403.] I am afraid I can't repeat any more of the conversation that I had with Mr. Clements. I cannot repeat anything in this telephonic conversation I had with Mr. Ferer, except that I was selling the surface equipment, all I can remember is the general conversation. I was present at this meeting in Mr. Paradise's office. [R. p. 404.] There was a discussion relative to certain items which were to be sold; yes. Mr. Paradise did pass out copies of the contract to everybody in the room. I don't recall reading it but I recall having it in my hand and going over it with the rest of them. I probably did hear the first part of that contract read, "all of the producing and refining equipment on the Casmalia lease". I did not hear anybody there say that the company was only selling the surface equipment. [R. p. 405.] I got my estimate of 1,500 tons of salvage. By taking the weights of the pipe and the boilers and the various pieces of equipment and totaling it all up. [R. p. 406.] Those figures shown there are the accepted weight for standard pipe. I did not measure these pipes. I took them from a map. [R. p. 407.] With reference to the word "sold" after certain of these items, the reason for that was that in working from this equipment map I first put down everything on there and then made that notation after certain items which were sold before Mr. Ferer bought the balance of it. Whether those words were on there at the time I showed these to Mr. Zeindenfeld, I believe they were, although I can't be positive. That is not a complete inventory. [R. p. 408.]

Redirect Examination

By Mr. Paradise:

That was not a complete inventory. In the sense that a complete inventory would have, necessarily, had itemized everything on the lease, which it was impossible for me to do inasmuch as a portion of the pipe was underground and the valves and fittings were concerned and there was no pipe under two inches taken into consideration. The descriptive matter was not complete as it would have been in an inventory. [R. pp. 408, 409.] I understood production and refinery equipment to mean all surface equipment that we had for sale. I did not have any other type of production equipment in mind at that time. My overall tonnage included the omitted items. That was the purpose of rounding out the 1,500 tons, to include such items as I had not listed, which I knew to be there. [R. p. 411.] Those omitted items were all pipe under two inches and valves, fittings and odds and ends of metal and steel on the lease. I understand pipelines to be surface equipment. It does not matter how deep on the property pipelines are buried as to whether or not they are considered surface equipment in the oil industry. [R. p. 412.]

Recross-Examination.

I expected these under two-inch pipelines to be sold. [R. p. 412.] In my opinion and from my interpretation of production equipment, it does not include casing. Rods, I would say, are production equipment. Pumps is surface and production equipment. Field tanks, yes. Derricks, yes. Engines, right. Boilers used for shooting live steam into the pipelines, yes, sir. And the pipelines that ran to the wells, yes. [R. p. 413.]

DAVID ZEIDENFELD.

I was an employee of Aaron Ferer & Sons, from January 1940 until approximately April or May of 1941. [R. p. 414.] I did solicit the purchase of material of that type from Richfield Oil Corporation during the time when I was employed by Aaron Ferer & Sons. I know Mr McGahan. I had some conversations with Mr. McGahan about the proposed sale of equipment at Casmalia. I believe there were two on this particular deal. The first conversation was about September of 1940. It took place at Mr. McGahan's office in Long Beach. [R. p. 415.] I don't remember whether there was stated whether it was going to be production or any other type of equipment. All I knew was there was going to be a big deal coming up. [R. p. 416.] Mr. McGahan told me that, "There is a pretty good-sized deal coming up, in which we are going to sell a lot of equipment." And I asked him, "How soon will that take place?" And he told me, "Well, it will take a little while yet. We don't know whether we are going to sell the whole works or not, or whether we are going to split it up in piecemeal". And I told him at a later date, when that comes up, to let me know and that is about the end of that conversation. And I know there was something mentioned about refinery deal coming up. [R. p. 417.] I came in the office that evening and told Mr. Ferer that there is a deal coming up at Richfield. And he told me, "Well, let me know when it is ready to take place." [R. p. 418.] I did not describe the transaction in any more detail to Mr. Ferer at that time. Our next discussion I believe was the latter part of November, at Mr. McGahan's office. Mr. McGahan said, I believe, that the property will be ready for sale within the

next short period, probably a month or so or three weeks or so, and it would be advisable for me to go up and see what is up there. And there were these so-called records that you have as far as what he thought might be up there for sale. [R. p. 420.] I am referring now to Mr. McGahan's pencil memoranda, which are Defendant's Exhibit B. I remember seeing these records but not actually having inspected them closely. He said, "Here is an idea of what we have up there." And I told him that, "I am not interested in knowing in detail what you have. I am interested in knowing in how many tons you have up there so we can determine as to how much we can bid on the material. Give us an idea as to the tonnage." I didn't look at them at all. The only thing is Mr. McGahan had them in his hand. I didn't inspect them minutely or microscopically to a point where I knew exactly what was in the records. I remember distinctly on page 1 where he showed me the page and I saw "1,500" encircled. And I said, "Is that the tonnage that you figure that is up there?" And he said, "Well, my idea of that is a rough estimate but don't hold me to it as to whether there is less up there or whether there is more up there. The best thing you can do is go up and look for yourself." [R. p. 421.] Well, he told me there was a lot of equipment for sale and there was a lot of pipe for sale. On this 1,500-ton calculation, I was told it was, roughly, 900 tons of pipe and 600 tons of steel. As far as I recall, it was refinery equipment and possibly tonnage of some of the steel in tanks. Well, I presume in the refinery equipment that the boilers would be in that deal, too. [R. p. 422.] Well, as far as I am concerned, I wasn't fully aware as to the production equipment being mentioned too much at that time. [R. p. 423.]

To give you a detailed idea of how I inspected these pages, Mr. McGahan had them in his hand and he thumbed through every page. And I told him, "I am not interested in anything in those pages but how many tons do you have?" And I wasn't inspecting those pages as he was going through them but he tried to give me an idea of what I might go up to see. But I told him, "As far as I am concerned, all I am interested in is how many tons you have up there." And, even though I would have inspected those minutely, he says not to hold him, Mr. McGahan, to anything in those things but to go up there and inspect it myself. I might have seen them and glanced at them but it didn't strike me at all as "Production" or "Refining", not being too familiar with the terms as a buyer of scrap iron and metals. I was simply interested in tonnage and I wouldn't recall exactly enough to say what was on those pages with the exception of that circle around the "1,500" that I distinctly remember. [R. p. 425.] I don't recall anything about lengths of pipelines. [R. p. 426.] Getting back to the fact of pipelines, I don't remember of we having discussed pipelines too much. It was just the idea I was interested in so much pipe up there and I think the word "pipe" was more or less discussed. I don't think much more was discussed with the exception of to go up and see what is there. Mr. McGahan suggested that I might make a date and meet him there sometime and inspect what was there. [R. p. 427.] With me or with somebody else from the firm. The understanding that I had was that everything at Casmalia would go unless Richfield felt it didn't bring enough money and then they would split it up and sell it piecemeal. As to the nature of the equipment that was to be sold, I don't remember too much about it, but I had it

fixed in my own mind that there was a refinery deal at Casmalia to be sold and the only way we could determine as to what would be sold would be to go up there and inspect it. I figured that the 900 tons of pipelines were parts of the refinery and interconnecting lines between tanks leading to the refinery or in the refinery. I didn't assume there was anything on the lease but a refinery at the time. [R. p. 428.] I don't remember the term exactly being used of "surface equipment". It might have been used at some time or other but I wouldn't say that I recall it exactly being used as "surface equipment". [R. p. 429.]

As to how long after my conversation with Mr. McGahan I made this report to Mr. Ferer, possibly the same night or same evening. I believe, to the best of my recollection, that I told him that "This Richfield deal is coming up pretty quick now", and that, if he were interested in the thing, he had better go up and take a look at it. As to whether or not I had said too much about details on it, I don't recall. [R. p. 432.] Wherein he said: "Mr. Ferer about so many tons of pipe up there and so many tons of steel. I think I told him the estimate Richfield had was, roughly, 1,500 tons, of which 900 tons was pipe and 600 tons was steel, which will have to be looked at pretty quick because they will be asking for a bid on it in the near future, in a week or two weeks from now." [R. p. 434.] My conversation with Mr. Ferer took place before that bid. I recall a conversation with Mr. Ferer in which I suggested the price which Aaron Ferer & Sons should bid in making its bid to, Richfield Oil Corporation for this equipment. I believe that did happen. I mean after the second conversation with Mr. McGahan,

when I came into the office and submitted that little report to Mr. Ferer. [R. p. 435.] I don't remember whether there was any subsequent conversation after that or not. It took place before Ferer & Sons submitted a bid to Richfield, as far as I recall it. Well, I didn't suggest to Mr. Ferer that he bid anything on the property but I told him that, if he is interested in buying that property, he would have to bid somewhether in the amount of $20,000.00. The tonnage I had in mind was, well, this 1,500 tons, roughly. [R. p. 436.]

DAVID ZEIDENFELD.

Cross-Examination

By Mr. Krasne:

I had never seen the property that Richfield proposed to sell. [R. p. 437.] This $20,000 figure that is being used is nothing more than what I had picked up in going around to different people who might have been bidding on it or I might have picked it up from some person at Richfield or some other place as a figure that Richfield will take for the material; that, otherwise, if they don't receive that, they will cut it up into piecemeal lots and sell it that way. [R. p. 438.] I wouldn't swear to it under oath but I believe that I did mention to Mr. Ferer about $20,000 might take the deal on a lump sum basis or else they will cut it up into smaller lots and sell it piecemeal. When Mr. Paradise asked me if I had the 1,500 tons of material in mind when I suggested to Mr. Ferer that he would have to bid $20,000 on this deal. I did not mean that, because I thought there were 1,500 tons of material there, the bid should be in the sum of $20,000. [R. p. 439.] I did have authority on making deals where there might have been 10 or 15 tons or 20 tons involved on a

lump sum basis but, when it came to a pretty good sized deal, Mr. Ferer handled it personally. If a deal contemplated not only the purchase of the material, but the dismantling of it and the transporting of it and the estimating of the cost of those various items, I had no authority to make such purchases for Aaron Ferer & Sons. [R. p. 440.] In my few discussions with Mr. McGahan, they were such short periods of discussion on this that I don't recall any time that "surface equipment" in itself was actually used. [R. p. 441.] The words "surface equipment" I recall were never used to me and all I was told was that there was a refinery deal for sale up north. [R. p. 442.] The second conversation with Mr. McGahan, was the occasion, when reference was made to Mr. McGahan's estimate of 1,500 tons of material. At the conclusion of this second conversation it was my understanding that Mr. McGahan was still referring to a refinery that was to be sold. Referring to the occasion of this second conversation and the pencil notations, I did not actually read the contents of those pages. [R. p. 443.] I didn't read page 1. The only thing that interested me as far as page 1 was that item of 1,500 tons that was shown to me, with a circle around it. As far as I recollect, that is all that was brought to my attention with the exception of Mr. McGahan told me that there was 900 tons and 600 tons, of which 900 tons was pipe and 600 tons was steel. I did not read page 2 on that occasion. My answer would be the same for the whole set-up that you have there with the exception of that one page, a little bit on page 7, with reference to a few pumps. [R. p. 44.] On that day that I had this conversation with Mr. McGahan, Mr. McGahan told me that they wanted to sell everything up—I believe he might have mentioned the word "Casmalia"

at that time but he said they wanted to sell the whole refinery up there complete. He told me that they would be ready to accept bids possibly in two or three weeks on this deal and it might be a pretty good idea to go up there and see what it was all about because I might have to make a few more trips after the first trip. [R. p. 445.] After the first conversation that I had with Mr. McGahan, I had a conversation with Mr. Ferer about this matter, the same evening or within a day or so after this discussion with Mr. McGahan in Mr. Ferer's office. As far as I can recall, I told Mr. Ferer that there was a deal coming up at Richfield. And Mr. Ferer told me, "Well, are they ready to shoot on the deal because we don't want to make any good chase?" And I says, "I don't think it will really be a deal for a little while yet. It is just in real preliminary discussions". And he says, "Well, let me know when it comes up," and that was the end of it. That was all that was said during that first discussion. [R. p. 446.] The next time I discussed it with Mr. Ferer, was after my second talk with Mr. McGahan. [R. p. 447.] I do remember mentioning something to Mr. Morris Ferer about having a second conversation with McGahan. I can't be too specific as to exactly what I told him because right after that I was shunted out of the whole deal and there was nothing asked of me because he and Mr. Clements had gone in on sort of a partnership arrangement on it. [R. p. 448.] I remember speaking to him about the deal but I can't be conclusive, to tell you exactly, what I might have said to him or even the substance of it. But we didn't sit down and really discuss the thing. As a matter of fact, although I have been asked about discussions which I may have had with Mr. Ferer about this subject matter, it is true

that all I ever did was to just casually refer to this deal to Mr. Ferer. I never did sit down and talk to him about any of the details of the deal. I did not know that Mr. Ferer was going up to look at the Casmalia property before he made a trip. I don't recall having anything much to do with that deal after he made the trip. [R. p. 449.] After I had had these preliminary discussions, the two discussions with Mr. McGahan, I did not carry on any negotiations for the purchase by Aaron Ferer & Sons of the Casmalia property from Richfield. I don't think Mr. McGahan never mentioned the sum of $20,000.00 to me. [R. p. 450.] I spoke to Mr. McGahan concerning this deal, as to what it will take to buy it, and Mr. McGahan wouldn't give me any information. [R. p. 451.] I will say this, that Mr. McGahan didn't give me any actual information of $20,000.00; that as far as that figure is concerned I took it on myself, I will put it, to say that that will be the amount that will buy the deal from my discussions with Mr. McGahan, although he didn't give me the exact amount. [R. p. 452.] I recall that then I asked him whether any one of the several different figures would get the deal and that McGahan declined to answer but I thought he smiled when I mentioned the figure of $20,000.00. It is vague in my mind whether he used that "producing equipment", expression or not. [R. p. 453.] There was one other occasion when I reported to my employer about a prospective deal on which I was personally not intending to bid but which I considered my employer might like to investigate to see whether a bid would be submitted. That was a deal on some cranes that the U. S. Engineering Department had for sale, and Mr. Ferer took that up by himself. [R. p. 455.]

R. D. MONTGOMERY.

Direct Examination

By Mr. Paradise:

I am now connected with the Richfield Oil Corporation. I am manager of the Production department. The functions of the production department are drilling and producing oil wells. I first went into the oil fields in 1911 as a workman. I was in the mining business, which I had previously studied at the University of California. While I was employed by the Standard Oil Company, that was in connection with the production and operation of oil wells. [R. pp. 460 and 461.] Prior to the time I was employed by Richfield Oil Corporation, I was employed by the receiver of Richfield Oil Company of California. I am now employed by Richfield Oil Corporation. Prior to that, I was employed by Richfield Oil Company of California. I became connected with Richfield Oil Company of California in 1926. I am familiar with the Casmalia oil field, the property owned by Richfield Oil Corporation. The wells were drilled from 1917 to 1925, that is drilled and produced. Production stopped of those wells in 1925. [R. p. 462.] In my opinion, the field has not been depleted, fully depleted. There is production on properties adjacent to and alongside of this property that we were discussing, by the Oliver C. Fields' Casmit Oil Company. It produces from 10 wells approximately 500 barrels a day at the present time. My first examination of the Casmalia Property was in 1930. [R. p. 464.]

In the early part of 1940 the removal of the derricks and tubing and rods from the wells at Casmalia occurred. I gave instructions to the purchasing department, to Mr.

Kelly. [R. p. 465.] I gave him definite instructions not to have the casing tampered with at all. [R. p. 466.] A casing, is landed and cemented upon the completion of your drilling. at which time, after cleaning out inside of the casing, you run tubing inside, under a different hook-up entirely. The tubing is far easier to remove. I attend some of the executive meetings of Richfield, once a week. The president of the company and its executive heads are present. I do recall some discussion of the matter of the removal of the tubing or rods from the wells at Casmalia prior to the time when those items of equipment were removed. [R. p. 467.] I recommended that, if we could get an operator to take this out on a satisfactory basis, we should do so because they wouldn't use that type of structure in future operations. At the occasion of that meeting, I made recommendation that neither the tubing, the rods, nor the derricks, would be required in our proposed future type of operation, and that the property to my mind presented good opportunities for operation, profitable operation. And with that in mind I was ordered to go ahead and have this stuff removed. [R. p. 468.] There was no discussion concerning the abandonment of the wells. I recall a conversation at the executive meetings in the fall of 1940. [R. p. 469.] Mr. Kelly of the purchasing department called me up in about September, 1940, and told me that the refining group was going to sell what they called refining equipment up there, and did we wish to sell our equipment that we would not use in our future operations. And he recommended that it would be a good time to make a combination sale of this stuff. I agreed with him and that was the initial starting of this sale of equipment, of our equipment. I can't say that I mentioned to Mr.

Kelly at that time anything about the oil wells. [R. p. 470.] At these so-called executive meetings, I proposed to sell this surface or production equipment. [R. p. 471.] I mentioned about the pipelines. Part of that could have been used, possibly some of the pipe. It was not adaptable for my plans at all. I described to the management at that time the nature of my proposed operation. [R. p. 472.] I gave instructions in connection with a sale concerning the six large storage tanks on the property. [R. p. 473.] I gave those instructions to either Mr. Kelly or Mr. Davis. I generally talked to Mr. Kelly, but I might have talked to Mr. Davis. At the time of this contract with Aaron Ferer & Sons, I had in my possession copies of the logs and histories of the wells. [R. p. 474.] It was never my intention at any time during the negotiation of this contract with Aaron Ferer & Sons and up to and including the date of the execution of that contract, on or about January 17, 1941, that the wells be abandoned, any of the oil wells on the property, or that any of the casing be removed from those wells. Mr. Kelly asked my approval of that contract prior to the execution of it. I always approve those types of contracts or look them over for approval. I would not have approved that contract had there been any provision in the contract for the abandonment of the wells or the removal of any of the casing from the wells. [R. p. 475.] By the removal of casing from a well in connection with the abandonment thereof there is some risk or danger that damage may be done to wells in an adjoinng field. [R. p. 478.]

Cross-Examination

By Mr. Sturzenacker:

I know that this contract provides that in wrecking the equipment or in removing the refining and production equipment sold to Aaron Ferer & Sons under this contract, he agreed to remove it in accordance with the various laws and rules and regulations. I saw that in the contract. [R. p. 479.] That contract was read by me and approved by me before it was signed, that is, by our people. I had laid down to the man that negotiated the contract the sale of this stuff the type of equipment in so far as the production department was concerned and in so far as I was authorized from my management as to the type of equipment that was to be sold. [R. p. 480.] The tubing that was in these wells at Casmalia prior to the time that Mr. Anderson removed it [R. p. 481] was Lapweld tubing, a very obsolete old fashioned type of tubing, according to the records of the Pan American, and that is what we bought from the Pan American. I authorized that contract between the Richfield Oil Corporation and W. R. Anderson. In reference to lapweld casing, that could have been casing. There is such a piece of equipment in the oil business as 4¾ inch lapweld casing and that same descriptive equipment could be used for tubing. [R. p. 482.] We pulled out this tubing or this casing that was used as tubing because we thought it was corroding. [R. p. 483.] Some of the tanks had oil in them and some of them had what is called tank bottoms in them. [R. p. 484.] This field was acquired in 1929 and we were thinking of operating it in 1930 but we went into receivership in 1931 and we stood dormant for six or seven and couldn't do anything. [R. p. 485.]

Since Richfield has owned this property, we have made a constant study of this problem and of reopening the field we have made reports on it and we have brought our management up to the field. Outside of studying and giving reports to our officials, cleaning up this debtirs around here I would call a start in the operations of our proposed work. [R. p. 486.] We had existing surface leases on that property and we had to protect the cattle from falling into sump holes. That has nothing to do with the operations of the field, I grant you. I believe that surface lease for the running of cattle had been in existence for several years. [R. p. 487.] We have re-leased the property for that same purpose for another five years, for farming beans. [R. p. 488.] The map is here and I see no marks around those wells. From a first glance, I see no dots on this map that represent the surface locations of wells, certainly. [R. p. 489.] We exempted an oil house or office and a garage, or whatever it was. Those log books are not in my possession. I wouldn't have sold them if I had known they were up there. [R. p. 491.] Casing, Your Honor, is a broad term. Some people would consider it producing equipment and some people call it subsurface equipment. It is certainly used in the production of the well and it is used to keep the formations from caving in. It is called generally subsurface equipment. There is that general distinction between the term "producing equipment" and the casing that is installed in well. [R. p. 492.]

Redirect Examination.

I did not understand that that contract covered any subsurface equipment at the time I approved it. [R. p. 494.]

MORRIS FERER.

Direct Examination.

The firm of Aaron Ferer & Sons is a co-partnership. I am in charge of the operation of the business. Our firm was associated with my father. We have been in business over 50 years. Mr. Zeidenfeld was a buyer of scrap material or scrap metals and scrap iron. He contacted mostly small scrap dealers and auto wreckers, generally, he did buying of smaller lots of material. He bought on the basis of the market price of the general market for all grades of scrap material, a fixed price that changed from time to time. He did not have any authority to negotiate for us on any deals that involved dismantling of materials and transportation. He had no authority on any lump sum deals that would amount to any type of figure. He might take a small deal that would amount to a few hundred dollars or something like that and consult with me on it but he had no authority to go into any type of large deal, whether it was a lump sum or anything else, without first getting proper authority. [R. pp. 499-500.] In this Casmalia deal a very large amount of money was involved. I first heard that there was to be some equipment sold at Casmalia when Mr. Clements came to me with the proposition which I place as sometime in the latter part of November. [R. p. 501.] He mentioned to me the type of deal it was and I told him that I was very much interested. He mentioned that he didn't have enough funds to handle a deal of that character; that, if we got the deal, I would finance it and we would split it or he would take a portion of the profits if there were any. [R. p. 502.] Prior to the date of this conversation with Mr. Clements, Mr. Zeidenfeld had not

said anything to me about this deal. [R. p. 503.] I do not recall him ever speaking to me about this particular deal. [R. p. 504.] Prior to the time that I made the deal with Richfield, no one working for Richfield had said anything to me about their estimate of quantity of material on the job. [R. p. 505.] I estimated there were approximately 3,000 to 6,000 tons. If I had estimated that there would be only 1,500 tons of material, I would not have made the same offer. The largest portion of the pipe when it was removed was in good condition, some of it was scrap. [R. p. 507.] The largest portion that was good pipe we sold to various pipe people that use it and resell it for pipe mostly in the oil business. In my opinion, the pipe was good enough to be used for that purpose, as pipe. We sold quite a large number of the tanks to the State of California. [R. p. 508.] If the material and equipment had been in the condition as described by Mr. Montgomery, that would have been considered scrap and it would have had a market for remelting purposes as scrap iron. The established market price for scrap iron in January 1941 was approximately $12 a ton f. o. b. [R. p. 509.] My testimony is that my overall estimate was from 3,000 to 6,000 tons of material in this Casmalia deal. [R. p. 515.] 1,100 tons of material removed by us has been sold. No one connected with Richfield ever told me that the defendant Richfield desired to sell only service equipment. [R. p. 517.] I remember the occasion of a meeting between me, Mr. Davis, Mr. Clements, Mr. McGahan and Mr. Paradise, in Mr. Paradise's office. It was a few days after I was at Richfield's office and gave them a check for $22,000 in payment of this deal. Before I went into this meeting at Mr. Paradise's office I brought Mr. Davis the check. He then handed me

a piece of paper outlining the nucleus of the deal and he contacted Mr. Paradise, who apparently was busy and couldn't see us at that time and told us to come back and that we were to go up and draw up the final or formal contract. I did not understand, after I had made my offer in writing and had received Richfield's offer in writing and after you had paid Richfield the $22,000, that there were to be further negotiations in connection with the deal. I took it for granted that we had already made a deal. [R. p. 518.] Plaintiff's Exhibit No. 2 was the offer that I had submitted to Richfield. [R. p. 519.] Plaintiff's Exhibit No. 3 was that acceptance that I had received from Richfield. Plaintiff's Exhibit No. 1 was the memorandum of reply which Mr. Davis gave me when I handed him the $22,000 on January 8th. [R. p. 520.]

Cross-Examination

By Mr. Paradise:

Mr. Zeidenfeld did not tell me that it would take about $20,000, in the neighborhood of $20,000, to make an acceptable bid. He did not ever mention a sum in connection with this. I don't remember ever discussing this transaction with Mr. Zeidenfeld. [R. p 521.] All of his reports were very oral. I have no knowledge of the equipment that is used in an oil field for operating purposes. I have experience as far as pipe is concerned and that any other oil company could easily use that pipe, for the function that pipe would be used for. [R. p. 522.] I am talking about the pipe after it had been taken out, which was in good condition to be re-used as it was taken out of the ground. It seems that the oil preserved the pipe because a great deal of it was just as good, in my opinion, as the day it came from the factory. [R. p. 523.]

I estimated in the deposition that, if the casing totaled some 50,000 feet, that casing would weigh approximately 2,000 tons, approximately 8 pounds to the foot. [R. p. 524.] I remember a visit to Mr. Kelly's office. I remember stating we had a very substantial loss on this deal and we discussed the wells at the time, and I told them at that conversation or at that meeting that we definitely anticipated getting the pipe out of those wells and that we would have a terrific loss if we didn't get what we expected to buy. We did encounter additional expense due to rainy weather and I mentioned that. [R. p. 527.] At that meeting which occurred, a few days subsequent to the giving of the check, there were discussions but the discussions were mainly as to when we were going to get started. There was one discussion there on the material which you had sold to our contract. [R. p. 529.] No contract had been drawn at that time. It is true that at that meeting the only documents that were before those who were discussing the transaction were this memorandum of January 8th, which is Plaintiff's Exhibit No. 1, and Aaron Ferer's offer of December 10th, which is Plaintiff's Exhibit No. 2, and Richfield's letter of January 2nd, which is Plaintiff's Exhibit No. 3, but I don't even know that those were before us at that time. [R. p. 530.] It was on that occasion of that conversation that I asked for the inclusion of the words "metal and lumber". I think there was some discussion about exclusion of the gas line or lines running from the superintendent's house to one or more of the wells. A gas line to a superintendent's house just didn't mean anything and I didn't give it any thought. [R. p. 531.] That hadn't been discussed in any prior meetings between me and Mr. Davis or Mr. McGahan. As to the matter of our insurance

coverage as a contractor, I think I brought that up myself. That is a very common thing in a deal of this kind. I think I made arrangements the minute I got your letter of January 2nd without insurance company to start making the proper and necessary arrangements for the men that were away on this job. But I do know, immediately the minute we got your acceptance, we had a deal, that had not been discussed prior to the meeting in your office. But it is a natural thing. We wouldn't lay ourselves open to any damages on the part of our own people suing us for work that has to be done. [R. p. 532.] The contract contains a provision concerning the protection by me of the property against mechanics' liens. I think it was just put in the contract and I took it for granted as a natural form of your method of doing business. [R. p. 533.] The memorandum that Mr. Davis gave me on January 8th was not merely a nucleus or the basis on which the contract would be drawn, it was a memorandum, in my opinion, and what I thought when I handed him my money was that it was the basis or the fundamentals of this deal and that the other things were just formal things, such as insurance and such as laws you were talking about and various other things that are just natural. [R. p. 534.] There were no matters of negotiation of importance with reference to this deal. [R. p. 535.]

Redirect Examination

By Mr. Krasne:

There were a number of things that Richfield asked me for, after I thought the deal had been set and I let them have. [R. p. 537.] In other words, I mean, after a deal is set, there is sometimes a little give and take, that is what happened in this deal. [R. p. 538.]

THOMAS HUBBARD CLEMENTS.

Direct Examination

By Mr. Sturzenacker:

I run the Refinery Equipment Company. It has run for eight years. I took a one-year course in oil production and technology, under Professor Uren, at the University of California, at Berkeley. During the time I have been engaged in the selling of equipment, I have sold production equipment. [R. p. 539.] I originally heard of this transaction, as far back as 1938 I contacted Richfield, or in 1937 possibly, to see if we could get some or all of this equipment out here. I contacted their local storekeeper, Mr. McGahan, once or twice away back. In the latter part of 1940 I was working with Mr. Davis [R. p. 540.] Mr. McGahan never told me at any time in any conversation that the Richfield Oil Company desired to sell their surface equipment at Casmalia. [R. p. 541.] I saw part of the stuff that Mr. Anderson was removing. He was pulling production strings and removing such things as crown blocks and certain steam pumps and stuff. [R. p. 542.] In my business of selling equipment, I sell pipe. This pipe that Mr. Anderson was removing was in excellent condition. In my opinion this pipe was removing usable for use for tubing in oil wells in Southern California. I am quite familiar with this Casmalia property, and the kind of tubing that is in that field and the adjacent properties operating from the same oil pool. The equipment that is being used by other operators is the same class of stuff that was used at the Richfield lease. Such operations are still being carried right across the wash or draw O. C. Fields is still operating that old Associated lease. I was in charge of the

removal of the equipment there. [R. p. 544.] We folks started to work up there, and after I got the ground cleared, we proceeded to call in two or three contractors who specialized in well pulling. [R. p. 547.] We consulted with two or three. We made a contract with Mr. Owens of Long Beach to pull one well as a test. It was in the summer of 1941. Up to that time no one in Richfield had ever told us that the casing in the wells wasn't to go on this deal. [R. p. 548.] I recall during 1940, of having several consultations or conversations with Mr. Davis relative to the purchase of this Casmalia property. Under date of September 25th, I wrote Mr. Davis a letter. It refers to the purchase of the equipment at Casmalia. [R. p. 556.] He wouldn't let me bid on the whole thing. As a matter of fact, he said, if I would bid on these particular items which I needed particularly, that he would take it up with the management and see if he could effect their disposal. He told me he would keep me advised. He did notify me finally, about the middle of November. [R. p. 557.] I was in his office many times. That was prior to the time that Mr. Ferer and I went in with a check on the 8th day of January, 1941. I purchased two plants in the year or year and a half prior to that from him, from Richfield. Those negotiations carried on with him personally in his office. I got in touch with Mr. Ferer. [R. p. 558.] That was in the early part of December. Prior to the time we went to the property he told me that the property was ready to be sold. [R. p. 559.]

Cross-Examination

By Mr. Paradise:

I have an interest in this transaction. It is predicated on one-third of the net returns from the transaction. [R. p. 561.] I did not have any conversations with Mr. McGahan during November or December of 1940, in connection with this proposed purchase of salvage equipment at Casmalia. [R. p. 563.] I know what casing is in an oil well. The casing differs from the tubing or production string generally in size and also as to its usage. As a rule it is installed in a well differently. As a rule, it is cemented in on the bottom edges to the formation. There are cases, however, in which it is put in with a temporary packer. [R. p. 566.] It is installed in the same manner as tubing or the production string. I think any of the pipe used in the performance of a well is production equipment. [R. p. 567.] My estimate of the tonnage of the recoverable casing from the wells on the property, well, we always assumed there would be a minimum of 1,000 tons and upward. [R. p. 568.] As a matter of practical operation casing could be taken or removed from a well without abandonment. [R. p. 571.] I am familiar with statutory requirements in California concerning the removal of any casing, any part of casing, from a well located in California. [R. p. 572.] Any removal of casing as well production strings has to be so reported to the State continuously. When I used the expression "any part of a production string" I meant thereby any part of the casing in an oil well. [R. p. 574.] I went to the Santa Barbara office of the supervisor of that territory and found the Richfield had not—I made an inquiry of the Division of Oil and Gas concerning their abandon-

ment requirements at a time prior to the date of the execution of this contract. [R. p. 575.] I did make an inquiry of the Division prior to January 17, 1941. I went to that office, the Santa Barbara office, the original office for that territory was in Santa Barbara. I talked to the assistant in charge [R. p. 576], about abandonment of the wells at Casmalia. [R. p. 577.] When we visited the property I was telling Mr. Ferer I had seen eight wells pulled on the same strata on adjacent property and out of the eight wells six of the casings that came out were perfect and two of them were in bad condition due to corrosion from hydrogen sulphide. I didn't tell him anything about my gas wells. [R. p. 582.] I did not discuss with Mr. Ferer, the abandonment or nonabandonment of wells from which gas was flowing. I discussed it with him on the date of the signing of the contract in your office, when the point was raised on the blueprint of the retention of two or three of these wells for gas purposes. There was a discussion of the retention of wells at that date in my office. The discussion lay between Ferer and myself and not between us and the Richfield. We went to the corner of the room and held a huddle when it came to that point and were discussing it. [R. p. 583.] It was a private conversation. At that time you presented to us a map for our inspection, showing exemptions which we hadn't been informed of before. [R. p. 584.] That was what prompted our private conversation. [R. p. 585.] I would say at least 50 per cent of the pipe which we removed was above the ground. Valves and fittings that are attached to pipelines might be either screwed or flanged. [R. p. 586.] We examined the pipelines as far as we could see. When we examined

all of the pipe, we found it good on the exterior and we subsequently found it good on the interior. [R. p. 587.] I would say we had 10 per cent wastage. The rest was all usable. We did not recondition the pipe before selling it. The refinery went ahead and used it. [R. p. 590.] If that was true, that it was 1100 tons that was removed, I would say that would be 80 per cent of the pipe. [R. p. 593.] The Kelly Pipe Company rejected a lot because it didn't conform to standard specifications of pipe. [R. p. 594.] Some pipe was rejected because they said it was inferior and some of it was rejected because it was what is called bastard sizes. [R. p. 595.] The casing I was talking about recovering there would be reused and resold as pipe, and that which was not usable as pipe would be sold for culverts. At the time I went to Santa Barbara the first time to talk to the Division of Oil and Gas about abandoning these wells, they told me the whole thing was up to the manager of the Division; that I would have to come back here again and see him. [R. p. 598.] Instead of going back the third time, we sent either two or three well-pullers in there to get the specific instructions. Even at the present time I have never received instructions from the supervisor in that district as to what is going to be necessary to abandon those wells. [R. p. 599.] When I referred to recoverable casing that would be in those wells after Mr. Anderson had finished and we could take out I term recoverable casing. [R. p. 600.] The only meaning, common, ordinary meaning, in the oil industry, that is to say, the portion that can be taken out and still qualify with the requirements of the Division of Oil and Gas. [R. p. 601.]

MORRIS FERER.

Cross-Examination

By Mr. Paradise:

It is true that I have testified in this case that you did not know to how many wells the excluded gas line ran. [R. p. 603.] I told you that I knew nothing about the mechanics of gas wells or any other kinds of wells. [R. p. 604.]